No. 04-1236
Vide 04-1203

Title:	Tony Goodman, Petitioner v. Georgia, et al.
Docketed:	March 16, 2005
Lower Ct:	United States Court of Appeals for the Eleventh Circuit
Case Nos.:	(02-10168)
Decision Date:	September 16, 2004
Rehearing Denied:	December 9, 2004

Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Mar 9 2005	Petition for a writ of certiorari filed. (Response due April 15, 2005)
Mar 31 2005	Order extending time to file response to petition to and including April 15, 2005.
Apr 15 2005	Brief of respondents Georgia, et al. in opposition filed. VIDED.
Apr 25 2005	Reply of petitioner Tony Goodman filed. (Distributed)
Apr 26 2005	DISTRIBUTED for Conference of May 12, 2005.
May 9 2005	DISTRIBUTED for Conference of May 12, 2005.
May 16 2005	Petition GRANTED. The case is consolidated with No. 04-1203 and a total of one hour is allotted for oral argument.
Jun 22 2005	Order extending time to file the joint appendix and petitioner's brief on the merits to and including July 29, 2005. VIDED.
Jul 20 2005	SET FOR ARGUMENT on November 9, 2005.
Jul 21 2005	Extension of time within which to file respondent's brief on the merits to and including September 22, 2005.
Jul 29 2005	Joint appendix filed. VIDED.
Jul 29 2005	Brief of petitioner United States as petitioner in No. 04-1203 filed. VIDED.
Jul 29 2005	Brief amici curiae of ADAPT, American Academy of Psychiatry and the Law, et al. filed. VIDED.
Jul 29 2005	Brief amicus curiae of National Disability Rights Network filed. VIDED.
Jul 29 2005	Brief amici curiae of Lawyers's Committee for Civil Rights Under Law, et al. filed. VIDED.
Jul 29 2005	Brief of petitioner Tony Goodman filed.
Jul 29 2005	Brief amici curiae of American Association on Mental Retardation, et al. filed. VIDED.
Jul 29 2005	Brief amicus curiae of Former President George H.W. Bush filed. VIDED.
Jul 29 2005	Brief amici curiae of Dick Thornburgh and National Organization filed.

	VIDED.
Jul 29 2005	Brief amicus curiae of American Bar Association filed. VIDED.
Jul 29 2005	Brief amici curiae of Paralyzed Veterans of America, et al. filed. VIDED.
Sep 22 2005	Brief of respondents Georgia, et al. filed. VIDED. (Distributed)
Sep 22 2005	Brief amici curiae of Tennessee, et al. filed. VIDED. (Distributed).
Sep 27 2005	Record received from U.S.C.A. 11th Circuit. (1 envelope)
Sep 28 2005	Motion of the Solicitor General for divided argument filed. VIDED.
Oct 3 2005	Record received from U.S.D.C. for Southern Dist. of Georgia. (1 box)
Oct 3 2005	Application (05A299) to file petitioner's reply brief on the merits in excess of page limits, submitted to Justice Kennedy.
Oct 7 2005	Motion of Tennessee, et al. for leave to participate in oral argument as amicus curiae and for divided argument filed. VIDED. (Distributed)
Oct 11 2005	Motion of the Solicitor General for divided argument GRANTED.
Oct 11 2005	Application (05A299) to file petitioner's reply brief on the merits in excess of page limits granted by Justice Kennedy provided that the document does not exceed 30 pages.
Oct 17 2005	Motion of Tennessee, et al. for leave to participate in oral argument as amici curiae and for divided argument GRANTED.
Oct 27 2005	Reply of petitioner United States petitioner in 04-1203 filed. VIDED. (Distributed).
Oct 27 2005	Reply of petitioner Tony Goodman filed. (Distributed)
Nov 9 2005	Argued. For petitioner in No. 04-1203: Paul D. Clement, Solicitor General, Department of Justice, Washington, D.C. For petitioner in No. 04-1236: Samuel R. Bagenstos, St. Louise, Mo. For respondents: Gregory A. Castanias, Washington, D.C.; and Gene C. Schaerr, Washington, D.C. (for Tennessee, et al., as amici curiae.)

Supreme Court, U.S.
FILED

No. 041236 MAR 9 - 2005
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In The

Supreme Court of the United States

TONY GOODMAN,

Petitioner

v.

STATE OF GEORGIA, *et al.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, and to what extent, Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 *et seq.*, validly abrogates state sovereign immunity for suits by prisoners with disabilities challenging discrimination by state-operated prisons, a question on which the courts of appeals are in conflict.

PARTIES TO THE PROCEEDING

Petitioner Tony Goodman brought this civil action against the State of Georgia and the Georgia Department of Corrections, as well as J. Wayne Garner, A.G. Thomas, Johnny Sikes, J. Brady, O.T. Ray, H. Whimbly, Margaret Patterson, and R. King. The individual named defendants were sued in their personal and official capacities as state prison officials.

All the defendants participated as appellees before the United States Court of Appeals for the Eleventh Circuit. The United States intervened in the court of appeals, pursuant to 28 U.S.C. § 2403(a), to defend the constitutionality of the statute.

The United States and each of the defendants are respondents in this Court pursuant to this Court's Rule 12.6, but the question presented herein has no application to the individual named defendants sued in their personal capacities.

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OPINIONS BELOW

The opinion of the Eleventh Circuit (App., *infra*, 1a-23a) is unreported. The district court's opinion granting summary judgment to the State on sovereign immunity grounds (App., *infra*, 24a-28a) is also unreported.

JURISDICTION

The court of appeals entered its judgment on September 16, 2004, and denied a petition for rehearing *en banc* on December 9, 2004. App., *infra*, 29a-30a. This petition is filed within 90 days of the latter date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Eighth, Eleventh, and Fourteenth Amendments to the United States Constitution, and of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, are set forth at App., *infra*, 31a-36a.

STATEMENT OF THE CASE

1. Title II of the Americans with Disabilities Act of 1990 (ADA) generally prohibits any "public entity" – including state-operated prisons – from "subject[ing]" any "qualified individual with a disability" to "discrimination." 42 U.S.C. § 12132; *Pennsylvania Dep't of Corrections v. Yesky*, 524 U.S. 206 (1998). Title II may be enforced through private suits against public entities, including state agencies. 42 U.S.C. § 12133. Congress expressly abrogated the States' Eleventh Amendment sovereign immunity from private suits in federal court. 42 U.S.C.

§ 12202. Based on detailed findings by Congress concerning the nature and persistence of discrimination against persons with disabilities, Congress expressly "invoke[d] the sweep of congressional authority, including the power to enforce the fourteenth amendment" in enacting the ADA. 42 U.S.C. § 12101(b)(4).

2. Petitioner Tony Goodman has paraplegia and uses a wheelchair to move about. App., *infra,* 2a. In 1995, Goodman was convicted and sentenced in Georgia state court to a term of imprisonment. *Ibid.* This case involves his treatment by Georgia at the Georgia State Prison in Reidsville, Georgia (GSP), during Goodman's incarceration in that prison from 1996 to 1999, and from 2004 to the present. *Id.* at 2a, 20a.

While at GSP, Goodman is confined to a 12-foot by 3-foot cell "for twenty-three to twenty-four hours per day." App., *infra,* 4a.[1] Goodman's cell is too narrow to permit him to turn his wheelchair around; as a result, he is "virtually immobile." *Id.* at 5a.

Because "the prison 'lacks facilities for the disabled for hygiene, drinking, and performing body excretion functions,'" App., *infra,* 4a (quoting complaint), Goodman "was forced to sit in his own bodily waste" on "several instances," *id.* at 18a, and on a number of occasions he has experienced significant injuries (including several broken bones and a seizure) when he attempted to use the toilet

[1] As the court of appeals noted, "[w]hile Goodman has had some disciplinary problems in the past, Goodman's allegations about the size of his cell appear to be unrelated to disciplinary issues. Instead, this [was] apparently the size of his cell whether or not he [was] in disciplinary isolation." App., *infra,* 4a.

or shower, *see id.* at 6a-7a. Defendants have denied Goodman "catheters and rehabilitative therapy," "failed 'to provide any assistance in preventing dangerous bedsores,'" and denied him "appointments with mental-health counselors." *Id.* at 8a (quoting complaint).

Goodman has "suffered 'long periods of deprivation of basic amenities,' such as 'showers, baths, adequate ventilation or heating, recreation, work, medical and MH/MR care, laundry service, cleaning service, and phone service'" because of the prison's inaccessibility. App., *infra,* 6a (quoting complaint). And he has been denied access to "virtually all prison programs and activities because of his disability," *id.* at 18a, including the law library and chapel, *id.* at 25a. Numerous GSP officials, from the Warden and Deputy Warden to the line staff at the prison, are aware of these problems and have done nothing to address them. *Id.* at 8a-9a.

3. In 1999, Goodman filed this suit *pro se* in the United States District Court for the Southern District of Georgia. App., *infra,* 20a. He named as defendants the State of Georgia, the Georgia Department of Corrections, and a number of Georgia prison officials. *Id.* at 3a. On the basis of the facts discussed above, Goodman asserted two basic claims. First, invoking 42 U.S.C. § 1983, he alleged that the defendants had violated his Eighth Amendment right to be free of cruel and unusual punishment. App., *infra,* 3a. Second, he alleged that the defendants had violated Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12131 *et seq.* App., *infra,* 3a. Goodman sought monetary damages on both claims and injunctive relief on the ADA claim. *Ibid.*

The district court dismissed Goodman's Section 1983 claim against all defendants for failure to state a claim. App., *infra,* 9a-10a. But the court denied the parties' cross-motions for summary judgment on the ADA claim and set the case for trial; the court found that a genuine issue of material fact existed regarding whether the defendants were in compliance with the ADA. *Id.* at 11a-12a.

In October 2001, following this Court's decision in *Board of Trustees v. Garrett*, 531 U.S. 356 (2001), defendants filed a renewed motion for summary judgment. App., *infra*, 12a. Defendants contended that state sovereign immunity protected by the Eleventh Amendment barred Goodman's claims insofar as he seeks damages against the State and that Goodman's claim for injunctive relief had been rendered moot when he was transferred out of GSP in 1999. *Ibid.* The district court agreed and granted the motion. *Ibid.*

4. The Eleventh Circuit affirmed in part and reversed in part. App., *infra*, 1a-23a. On the Section 1983 claim, the court of appeals reversed, holding that Goodman's complaint stated a claim for a violation of the Eighth Amendment in three respects. First, by confining him to a cell in which he could not move his wheelchair, the individual defendants effectively imposed "some form of total restraint twenty-three to twenty-four hours-a-day without penal justification," in violation of the principles articulated in *Hope v. Pelzer*, 536 U.S. 730, 738 (2002). App., *infra,* 18a. Second, by forcing Goodman "to sit in his own bodily waste because prison officials refused to provide assistance," the individual defendants violated the principles articulated in a long line of appellate-court Eighth Amendment cases that have "accord[ed] particular weight to exposure to human waste." App., *infra*, 18a &

n.10 (citing *McBride v. Deer*, 240 F.3d 1287, 1292 (10th Cir. 2001); *McCord v. Maggio*, 927 F.2d 844, 848 (5th Cir. 1991); *Fruit v. Norris*, 905 F.2d 1147, 1151 (8th Cir. 1990); *Johnson v. Pelker*, 891 F.2d 136, 139 (7th Cir. 1989); *LaReau v. MacDougall*, 473 F.2d 974, 978 (2d Cir. 1972), *cert. denied*, 414 U.S. 878 (1973)). Finally, by "knowingly providing no physical therapy and inadequate medical treatment," by their "systematic denial of access to virtually all prison programs and activities because of [Goodman's] disability," and by providing "woefully inadequate and inhumane prison facilities for the disabled, such as toilets without the necessary support or handrails," the individual defendants showed "deliberate indifference" to Goodman's "serious medical condition." App., *infra*, 18a-19a; *see Estelle v. Gamble*, 429 U.S. 97, 104-105 (1976).

On the ADA claim, the court of appeals sought additional briefing from the parties (including the United States, which intervened to defend the constitutionality of the statute) following this Court's decision in *Tennessee v. Lane*, 124 S. Ct. 1978 (2004). Subsequent to that briefing, the court of appeals affirmed the district court's holding that Goodman's claims against Georgia and the Georgia Department of Corrections are barred by the Eleventh Amendment's protection of state sovereign immunity. App., *infra*, 19a.[2] The court of appeals relied on its decision in *Miller v. King*, 384 F.3d 1248 (11th Cir. 2004), in which

[2] The court of appeals held that Goodman's claims for injunctive relief against state officials in their official capacities could proceed under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), and it reversed the district court's conclusion that Goodman's transfer out of GSP mooted the request for injunctive relief because Goodman had been transferred back to GSP in the interim. *See* App., *infra*, 20a-21a.

the same three-judge panel had ruled, again after supplemental briefs addressing the impact of *Lane*, that "Title II of the ADA, as applied in the Eighth-Amendment context to state prisons, fails to meet the requirement of proportionality and congruence" that this Court uses to assess the validity of Fourteenth Amendment legislation. *Id.* at 1273, 1275 (citing *City of Boerne v. Flores*, 521 U.S. 507, 533 (1997)). Title II's abrogation of state sovereign immunity was thus not a valid exercise of Congress's enforcement authority under Section 5 of the Fourteenth Amendment, in the court's view, even in a case like *Miller* or the present case, where the plaintiff states a claim that the conditions challenged under Title II also violate his constitutional rights. *See id.* at 1276 n.34.

5. The court of appeals denied a petition for rehearing *en banc* filed by intervenor the United States. App., *infra*, 29a-30a.

REASONS FOR GRANTING THE PETITION

This case concerns a matter of longstanding disagreement in the lower courts. Before this Court's decision in *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206 (1998), the courts of appeals divided over the question whether Title II of the ADA applied to the operations of state prisons. The courts that rejected such an application of the ADA argued that an effort by Congress to extend its protections to inmates with disabilities would raise serious constitutional concerns. *See, e.g., Amos v. Maryland Dep't of Pub. Safety & Corr. Servs.*, 126 F.3d 589, 603-604 (4th Cir. 1997), *vacated and remanded in light of Yeskey*, 524 U.S. 935 (1998). In *Yeskey*, however, this Court

held that Title II of the ADA *does* by its terms apply to the operation of state prisons. *See Yeskey*, 524 U.S. at 210-212. But the Court reserved the question whether Congress had constitutional authority to extend the ADA to that context. *See id.* at 212-213.

In *Tennessee v. Lane*, 124 S. Ct. 1978 (2004), this Court held that Title II of the ADA represents a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment, and thus could abrogate state sovereign immunity, at least insofar "as [the statute] applies to the class of cases implicating the accessibility of judicial services." *Id.* at 1993. Since *Lane*, the lower courts have addressed Congress's Section 5 authority to abrogate immunity to Title II suits in a variety of other contexts. In the prison context, the courts of appeals that have addressed this question already are in conflict with one another. *Compare* this case and *Miller v. King*, 384 F.3d 1248, 1275 (11th Cir. 2004) (application of Title II to prison context exceeds Congress's Section 5 authority), *with Phiffer v. Columbia River Corr. Inst.*, 384 F.3d 791, 792-793 (9th Cir. 2004) (upholding Section 5 basis for Title II in prison case), *pet. for cert. filed*, No. 04-947 (Jan. 15, 2005).

This case presents the ideal vehicle to resolve that conflict in the Circuits. The extensive factual record developed here gives the Court the opportunity to address each of the three distinct Section 5 arguments regarding the constitutionality of the ADA's abrogation that have been addressed by the courts of appeals: that Title II is proper Section 5 legislation in all of its applications; that the statute is proper Section 5 legislation in its applications to the class of cases involving prisons; and that Title II is proper Section 5 legislation at least in those cases in which the statute provides a remedy for a violation of the

plaintiff's constitutional rights. In *Columbia River Correctional Institute v. Phiffer*, No. 04-947, in which a petition for writ of *certiorari* is pending, this Court would not be able to reach all of these points of conflict between the Circuits, because that case contains no claim that the alleged Title II violation also violates the Constitution. Accordingly, the Court should grant *certiorari* in the instant case to resolve the circuit conflict.

A. The Courts Of Appeals Are In Conflict Regarding Whether, And To What Extent, The ADA Validly Abrogates State Sovereign Immunity In The Prison Context

1. There is a clear and direct conflict among the Circuits regarding the question whether Congress has Section 5 power to abrogate state sovereign immunity for private suits under Title II of the ADA in cases involving state prisons. In the case under review, the Eleventh Circuit held that such an application of the ADA went beyond Congress's power. In so holding, the court of appeals followed its decision in *Miller v. King*, 384 F.3d 1248, 1275 (11th Cir. 2004), which affirmed the dismissal, on Eleventh Amendment grounds, of the Title II claim of another Georgia prisoner who uses a wheelchair.

In *Miller*, as here, the Eleventh Circuit held that the plaintiff could proceed under Section 1983 with his claim that state officials violated his Eighth Amendment rights. *See id.* at 1261-1263. But the court nonetheless held that the plaintiff's Title II claim was barred by the Eleventh Amendment. The Eleventh Circuit believes that *Lane*'s holding that Title II validly abrogated state sovereign immunity in the access-to-courts context cannot extend to the prison context because, in that court's view, Title II

"goes well beyond the basic, humane necessities guaranteed by the Eighth Amendment." *Miller*, 384 F.3d at 1274. Accordingly, the court held that "Title II of the ADA, as applied in the Eighth-Amendment context to state prisons, fails to meet the requirement of proportionality and congruence." *Id.* at 1275. The court below followed its *Miller* holding to rule that Goodman's Title II damages claim in the instant case is barred by the Eleventh Amendment. *See* App., *infra*, 19a.

The instant case directly conflicts with the Ninth Circuit's decision in *Phiffer*, which held "that the State is not entitled to Eleventh Amendment immunity under Title II of the ADA." 384 F.3d at 792. There can be little doubt that the conflict in the Circuits will persist. In *Phiffer*, a prisoner alleged that Oregon prison authorities' failure to accommodate his disability caused him severe physical pain. He sued under Title II and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, and the district court denied a motion by the State for judgment on the pleadings on sovereign immunity grounds. *Phiffer*, 384 F.3d at 792. On interlocutory appeal prior to this Court's decision in *Lane*, the Ninth Circuit affirmed the denial of the motion to dismiss. *See Phiffer v. Columbia River Corr. Inst.*, 63 Fed. Appx. 335 (9th Cir. 2003). Following *Lane*, this Court granted *certiorari*, vacated, and remanded for further consideration. *See* 124 S. Ct. 2386 (2004). On remand, the Ninth Circuit concluded that its initial resolution of the case was "consistent with *Lane*'s holding," and it "reissue[d its] original disposition in per curiam form without further amendment." *Phiffer*, 384 F.3d at 792.

The *Phiffer* court relied on a series of pre-*Lane* Ninth Circuit cases, one of which arose in the prison context, as

"clearly command[ing] the conclusion that the State is not entitled to Eleventh Amendment immunity under Title II of the ADA." *Ibid.* (citing *Dare v. California*, 191 F.3d 1167, 1175 (9th Cir. 1999), *cert. denied*, 531 U.S. 1190 (2001); *Clark v. California*, 123 F.3d 1267, 1270 (9th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998)). Those earlier cases held that Title II, in all of its applications, was a valid exercise of Congress's Section 5 power. *See Dare*, 191 F.3d at 1175-1176 (holding that Title II "as a whole constitutes a proper exercise of Congress' power to legislate under § 5"); *Clark*, 123 F.3d at 1270 (holding generally that "both the ADA and the Rehabilitation Act were validly enacted under the Fourteenth Amendment"). Although the State contended that those cases were inconsistent with *Board of Trustees v. Garrett*, 531 U.S. 356 (2001), the Ninth Circuit responded that it had already "revisit[ed]" its precedent and had "already rejected the State's claims." *Phiffer*, 384 F.3d at 792-793 (citing *Hason v. Medical Bd.*, 279 F.3d 1167, 1171 (9th Cir. 2002), *cert. dismissed*, 538 U.S. 958 (2003); *Thomas v. Nakatani*, 309 F.3d 1203, 1209 (9th Cir. 2002); *Lovell v. Chandler*, 303 F.3d 1039, 1050-1051 (9th Cir. 2002), *cert. denied*, 537 U.S. 1105 (2003)). Accordingly, the court "decline[d] further review of [its] settled precedent," despite the concurrence's statement that the "continued vitality" of those cases "is uncertain" after *Lane*. *Id.* at 793 (O'Scannlain, J., concurring).

Other courts have also demonstrated confusion regarding the effect of *Lane* on prison litigation brought

under Title II of the ADA.[3] This Court's intervention is necessary to resolve this enduring conflict.

2. The Eleventh Circuit's ruling also implicates a broader confusion regarding the method for applying the "congruence and proportionality" analysis established in *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997), to Title II of the ADA. In its opinion below, the court of appeals held that Congress lacks power under the enforcement provision of the Fourteenth Amendment to abrogate state sovereign immunity when applying the ADA to the prison context – even in a case in which the conduct that violates the ADA also violates the Constitution itself. Although the court allowed Goodman's Eighth Amendment claims brought under Section 1983 to proceed against the state officials in their individual capacities, it concluded that Goodman's ADA claims against the State – based on

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[3] *Compare Mercer v. Rodriquez*, 849 A.2d 886, 888, 895 (Conn. App. Ct. 2004) (rejecting State's argument that "sovereign immunity barred the court's jurisdiction over [a prisoner's] claims for damages" under Title II of the ADA, and relying on *Lane* to hold that "the Superior Court had subject matter jurisdiction over the plaintiff's claims"), *and Carrasquillo v. City of New York*, 324 F. Supp. 2d 428, 442 (S.D.N.Y. 2004) (Title II claim that prison forced prisoner who had difficulty walking to walk great distances to use law library "*is* actionable under" *Lane*), *with Degrafinreid v. Ricks*, No. 03-6645, 2004 WL 2793168, at *6 (S.D.N.Y. Dec. 6, 2004) (prisoner's Title II claim barred by Eleventh Amendment absent specific allegation that defendants' conduct "was driven by 'discriminatory animus or ill will'"); *see also Spencer v. Easter*, 109 Fed. Appx. 571, 573 (4th Cir. 2004) (stating in prison conditions case that *Lane* "did not, however, decide whether the statutory abrogation of sovereign immunity was constitutional with regard to non-fundamental rights," but resolving case on other grounds), *cert. denied*, No. 04-8293 (Mar. 7, 2005); *Flakes v. Frank*, 322 F. Supp. 2d 981, 982 (W.D. Wis. 2004) (concluding that *Lane* might permit the prisoner-plaintiff to overcome the State's Eleventh Amendment immunity defense).

precisely the same conduct – are barred by sovereign immunity. App., *infra*, 19a.

By contrast, other Circuits have concluded that, at the very least, Title II represents a proper exercise of Congress's Section 5 power in cases in which the statute provides a remedy merely for a violation of the plaintiff's constitutional rights. In *Garcia v. S.U.N.Y. Health Sciences Center*, 280 F.3d 98 (2d Cir. 2001), the Second Circuit held that Congress could abrogate a State's sovereign immunity from damage actions for violations of Title II "motivated by discriminatory animus or ill will based on the plaintiff's disability" because "actions based on discriminatory animus or ill will towards the disabled are generally the same actions that are proscribed by the Fourteenth Amendment – *i.e.*, conduct that is based on irrational prejudice or wholly lacking a legitimate government interest." *Garcia*, 280 F.3d at 111. Similarly, the Sixth Circuit held in *Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808 (6th Cir.) (*en banc*), *cert. denied*, 537 U.S. 812 (2002), that Congress had validly abrogated a State's immunity to a Title II claim when "[a]s applied to the case" before the court, the ADA's requirement "serves to protect [the plaintiff's] due process right." 276 F.3d at 815.

A panel of the First Circuit elaborated on the basis for these holdings in *Kiman v. New Hampshire Department of Corrections*, 301 F.3d 13 (1st Cir. 2002). In *Kiman*, a prisoner sued for ADA violations that also constituted actual violations of the Eighth Amendment. The panel held that "Congress acted within its powers in subjecting the states to private suit under Title II of the ADA, at least as that Title is applied to cases in which a court identifies a constitutional violation by the state." *Id.* at 24. Citing

United States v. Raines, 362 U.S. 17 (1960), the panel noted that "[g]enerally, a court will not strike down a statute as unconstitutional unless it is convinced that the statute is unconstitutional on the facts of a specific case, that is, as applied to the party that argues for unconstitutionality." 301 F.3d at 20. The panel concluded that " there is no affront to protected dignity or fiscal interests from requiring the states to appear and defend their conduct when Congress has provided the remedy of a private suit for a specific constitutional violation. Without such concerns at stake, we follow the traditional approach of taking small steps and considering separately the separate applications of a statute." *Id.* at 22.[4]

In holding to the contrary, the Eleventh Circuit deemed it irrelevant that the plaintiff invoked Title II to challenge actions that – according to the court's own opinion on the Section 1983 claim – violate the Eighth Amendment. The court read *Lane* as requiring that the Section 5 basis for Title II be "considered context by context," *Miller*, 384 F.3d at 1276 n.34, meaning that it had to consider the abrogation's constitutionality in one fell swoop for all potential suits that could be brought in the state prison context. Because it concluded that *other* applications of Title II in the state prison context went

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[4] On rehearing *en banc* in *Kiman*, the First Circuit affirmed, by an equally divided court and without opinion, the district court's order dismissing the case on sovereign immunity grounds. *See Kiman v. New Hampshire Dep't of Corr.*, 332 F.3d 29 (1st Cir. 2003) (*en banc*). This Court subsequently granted *certiorari*, vacated the judgment, and remanded for further consideration in light of *Lane*. *See* 124 S. Ct. 2387 (2004). The case was returned to the district court for further proceedings.

beyond what is "necessary to enforce the Eighth Amendment's ban on cruel and unusual punishment," the court held that the statute could not validly abrogate state sovereign immunity in *any* case "in the Eighth-Amendment context [involving] state prisons." *Id.* at 1274-1275.

The conflict between the Ninth and Eleventh Circuits on the application of Title II to state prisons thus reflects a deep disagreement in the lower courts over the levels of generality at which congruence and proportionality analysis may be conducted. This Court's intervention is necessary to resolve that disagreement.

B. The Eleventh Circuit's Sovereign Immunity Ruling Is In Error

In *Lane*, this Court reserved the question whether Title II of the ADA is valid Section 5 legislation in all of its applications. *See Lane*, 124 S. Ct. at 1992-1993. But whatever the answer to that broad question, the Eleventh Circuit's decision involving constitutional violations in the state prison context clearly contravenes the principles this Court set forth in *Lane*.

1. The Eleventh Circuit's holding that Title II exceeds Congress's Section 5 authority in the prison context is inconsistent with *Lane*'s holding that Title II is proper Section 5 legislation at least insofar "as it applies to the class of cases implicating the accessibility of judicial services." *Lane*, 124 S. Ct. at 1993. The Court noted that the Due Process Clause, and various Bill of Rights provisions incorporated therein, guarantee individuals with disabilities a "right of access to the courts," *id.* at 1988, and that this right imposes on States "a number of affirmative obligations" to facilitate court access, *id.* at 1994.

The Court also noted a substantial record of state violations of those obligations. *See id.* at 1989-1992. In light of that record, the Court concluded that, at least as applied to guarantee access to the judicial system, Title II is "a reasonable prophylactic measure, reasonably targeted to a legitimate end." *Id.* at 1994.

For similar reasons, Title II is an appropriate exercise of Congress's Section 5 authority to safeguard the rights of an historically marginalized population in "the prison context, when the government's power [over an individual] is at its apex." *Johnson v. California*, 543 U.S. ___, ___, 2005 WL 415281, at *8 (Feb. 23, 2005). As in the access-to-courts context addressed in *Lane*, the Constitution imposes on states a series of affirmative obligations with respect to those in their custody. *See DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 198 (1989) (recognizing that States have "affirmative duties of care and protection with respect to," *inter alia*, prisoners). In particular, the Eighth Amendment, as incorporated in the Fourteenth Amendment, requires States to "provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must 'take reasonable measures to guarantee the safety of the inmates.'" *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). Of particular importance to prisoners with disabilities, state officials violate the Constitution when they act with "deliberate indifference to serious medical needs of prisoners." *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

And the Constitution imposes on States a range of other affirmative obligations in the prison context, many of which are implicated by the facts of the instant case based on Goodman's demonstration that he was deprived

of access to the law library and the chapel. *See, e.g.*, *Lewis v. Casey*, 518 U.S. 343, 351 (1996) (state must provide prisoners with "meaningful access to the courts") (internal quotation marks omitted); *Cruz v. Beto*, 405 U.S. 319, 322 n.2 (1972) (state must afford prisoners "reasonable opportunities" to exercise their religion); *Vitek v. Jones*, 445 U.S. 480, 495-496 (1980) (state must provide procedural protections before transferring prisoner to a mental hospital).

These affirmative obligations must be viewed against the backdrop of the State's general obligation under the Equal Protection Clause not to engage in arbitrary or irrational discrimination on the basis of disability. *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 447-450 (1985). As this Court recently noted, the right to be free from invidious discrimination "is not a right that need necessarily be compromised for the sake of proper prison administration." *Johnson*, 543 U.S. at ___, 2005 WL 415281, at *7. Compliance by prisons with the Equal Protection Clause "is not only consistent with proper prison administration, but also bolsters the legitimacy of the entire criminal justice system." *Ibid.*

Unfortunately, States have frequently violated the constitutional rights of prisoners with disabilities. Congress found that "discrimination against individuals with disabilities persists in such critical areas as * * * institutionalization," 42 U.S.C. § 12101(a)(3), a finding this Court said "can be thought to include penal institutions." *Yeskey*, 524 U.S. at 211. This Court has also noted the pattern of state violations of the constitutional rights of disabled prisoners, *see Lane*, 124 S. Ct. at 1989 & n.11, and lower-court cases provide

"confirming judicial documentation" of it. *Garrett*, 531 U.S. at 376 (Kennedy, J., concurring).[5]

Given the affirmative obligations the Constitution imposes on States in their treatment of prisoners with disabilities, and the extensive history of state violations of those obligations, the conclusion that the Court reached in *Lane*'s access-to-courts context applies equally here: "Judged against this backdrop, Title II's affirmative obligation to accommodate persons with disabilities in [state prisons] cannot be said to be 'so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.'" *Lane*, 124 S. Ct. at 1994 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997)). The Eleventh Circuit was wrong to reach a contrary conclusion, and the issue is squarely presented for this Court's review.

2. The court of appeals contravened the principles set forth in *Lane* in a second way – by holding that Title II

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[5] *See, e.g.*, *Weeks v. Chaboudy*, 984 F.2d 185, 187 (6th Cir. 1993) (denial of wheelchair to prisoner with paralysis, resulting in prisoner's inability to shower himself or leave his cell, violated Eighth Amendment); *Beckford v. Irvin*, 49 F. Supp. 2d 170, 180 (W.D.N.Y. 1999) (Eighth Amendment violation existed where plaintiff "was regularly deprived use of his wheelchair for extended periods of time, plaintiff was unable to shower, and . . . he was not allowed to use a cup in order to try to bathe by taking water out of his cell toilet or drinking fountain"); *Clarkson v. Coughlin*, 893 F. Supp. 1019, 1043 (S.D.N.Y. 1995) (denial of interpretive services and assistive devices to deaf prisoners during medical treatment violated Eighth Amendment where "communication between the patient and medical personnel [was] essential to the treatment in question"); *Casey v. Lewis*, 834 F. Supp. 1569, 1582 (D. Ariz. 1993) (failure to provide accessible bathrooms, showers, and cells violated Eighth Amendment).

could not validly abrogate state sovereign immunity even in a case in which the statute does nothing more than provide a remedy for an actual violation of the plaintiff's constitutional rights. The Eleventh Circuit read *Lane* as requiring the abrogation issue to be "considered context by context." *Miller*, 384 F.3d at 1276 n.34. Under that court's reading, unless Title II is valid Section 5 legislation as applied to *all* prison cases it cannot be valid Section 5 legislation as applied to *any* prison case – even one in which the plaintiff's constitutional rights have been violated. That all-or-nothing approach reflects a fundamental misreading of *Lane*.

In *Lane*, 124 S. Ct. at 1993 & n.19, this Court reaffirmed the holding in *Raines*, 362 U.S. at 24-25, that a statute must be upheld if Congress had power to reach the particular fact setting addressed by the complaint – even if other applications of the statute might exceed congressional power. Congress plainly has Section 5 power to provide a remedy for an actual violation of the Fourteenth Amendment, including Bill of Rights provisions incorporated by the Due Process Clause. *See City of Boerne*, 521 U.S. at 519-520 (Section 5 gives Congress power to provide remedies for constitutional violations); *Lane*, 124 S. Ct. at 2010 (Scalia, J., dissenting) (agreeing that Congress has Section 5 power to authorize lawsuits in cases of actual constitutional violations). Under the principles set forth in *Lane*, then, Title II's abrogation of state sovereign immunity must, at the very least, be upheld in a case such as this in which the statute is invoked to provide a remedy for an actual violation of the plaintiff's Fourteenth Amendment rights.

As the court of appeals acknowledged, App., *infra*, 3a, Goodman invokes Title II to challenge conduct that also

violates his Eighth Amendment rights against cruel and unusual punishment, rights that are incorporated in the Fourteenth Amendment's Due Process Clause. *See Robinson v. California*, 370 U.S. 660, 666 (1962). Accordingly, "'the complaint here call[s] for an application of the statute clearly constitutional'" under the Fourteenth Amendment. *Lane*, 124 S. Ct. at 1993 n.19 (quoting *Raines*, 362 U.S. at 24). Title II of the ADA can therefore properly be applied in this case even if it would exceed Congress's Section 5 power as applied to other prison cases. The court of appeals was wrong to rule otherwise.

C. This Case Presents The Best Opportunity To Resolve The Matters On Which The Courts Of Appeals Are In Conflict

This case presents the Court with a clear opportunity to resolve the conflicts detailed above. *Columbia River Correctional Institute v. Phiffer*, No. 04-947, which is currently pending on a petition for a writ of *certiorari*, also presents the question of the validity of Title II's abrogation of state sovereign immunity in the prison setting, but that case likely would not provide the Court the opportunity to resolve the matters that have created conflict and confusion in the Circuits.

The parties in this case have developed an extensive factual record, and the court of appeals held that the allegations in the complaint – which are mirrored by evidence presented at the summary judgment stage – state a claim for violation of the Eighth Amendment. As a result, this case presents the Court with an opportunity to address each of the three distinct arguments, discussed above, that the courts of appeals have confronted in deciding whether Title II is valid Section 5 legislation in

the prison context: that the statute is valid Section 5 legislation in all of its applications, as the Ninth Circuit held; that it is valid Section 5 legislation as applied to prison cases, a proposition the Eleventh Circuit rejected; and that it is valid Section 5 legislation as applied to cases in which the defendant violated the plaintiff's constitutional rights, a proposition the Eleventh Circuit also rejected but which a number of courts of appeals espoused prior to *Lane*, and which finds support in *Lane* itself.

Phiffer, by contrast, has not received the kind of factual development that will permit informed consideration of the as-applied approach to Section 5 analysis that this Court adopted in *Lane*. Indeed, because the *Phiffer* court did not receive supplemental briefing from the parties in light of *Lane*, this Court would be forced to decide the question of Title II's as-applied constitutionality as a matter of first view, without any analysis of the issue in the lower courts. Nor, unlike here, would this Court have the benefit of a court of appeals opinion that actually elucidated the ways in which the State's treatment of the plaintiff implicated his constitutional rights. And because the *Phiffer* plaintiff has not alleged that his treatment violated his constitutional rights, that case would not present this Court with an opportunity to address the question whether Section 5 empowers Congress to apply Title II in cases in which the statute provides a remedy for violations of the plaintiffs' constitutional rights. This case, unlike *Phiffer*, presents the best opportunity for the Court to resolve the issues that have drawn the Circuits into conflict.

As a consequence of the Eleventh Circuit's decision in this case, disabled state prisoners in the States of Alabama, Florida, and Georgia (who together imprison 12 percent of

the 1.3 million prisoners incarcerated in state prisons nationwide, *see* Bureau of Justice Statistics, U.S. Dep't of Justice, *Prisoners in 2003*, at 4 tbl. 4 (Nov. 2004)), have been deprived of the opportunity to enforce fully their federal rights under the ADA in contrast with similarly-situated prisoners in other States. That disparity should not be permitted to continue.

CONCLUSION

For the reasons set forth above, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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March 9, 2005

APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-10168

D. C. Docket No. 99-00012-CV-JEG-6

TONY GOODMAN,

Plaintiff-Appellant,

versus

O.T. RAY, et al.,

Defendants,

THE STATE OF GEORGIA,

Defendant-Appellee,

UNITED STATES OF AMERICA,

Intervenor.

Appeal from the United States District Court
for the Southern District of Georgia

(SEPTEMBER 16, 2004)

Before CARNES, HULL and HILL, Circuit Judges.

HULL, Circuit Judge:

Plaintiff Tony Goodman, a paraplegic state prisoner, appeals (1) the dismissal of his Eighth-Amendment claims

brought under 42 U.S.C. § 1983, and (2) the grant of summary judgment on his disability-discrimination claims brought under Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12131, *et seq.* ("ADA").

After review and oral argument, we: (1) reverse, in part, the district court's dismissal of Goodman's Eighth-Amendment claims for monetary and injunctive relief under § 1983; (2) reverse the magistrate judge's grant of summary judgment for the defendants on Goodman's ADA claims for injunctive relief; and (3) affirm the grant of summary judgment for all defendants with regard to Goodman's ADA claims for monetary damages under Title II of the ADA. We further order that Goodman be allowed an opportunity to amend and streamline his complaint as to his Eighth-Amendment claims and his ADA claims under Title II for injunctive relief.

I. FACTUAL BACKGROUND

According to the medical evidence in the record, Goodman was involved in an automobile accident in 1992, which left him unable to walk. Goodman is a wheelchair-dependant paraplegic, whose injuries include multiple spinal fractures.

In 1995, Goodman was convicted of aggravated assault, possession of a firearm by a convicted felon, and possession of cocaine with intent to distribute. On June 18, 1996, Goodman was transferred to Georgia State Prison ("GSP"), in Reidsville, Georgia. Goodman's complaint concerns his stay at GSP.

A. Complaint

After filing numerous administrative grievances with prison officials regarding the conditions of confinement at GSP, Goodman filed this federal suit claiming, *inter alia*, violations of the Eighth-Amendment and Title II of the ADA. Goodman's *pro se* complaint names the following defendants: (1) the Georgia Department of Corrections ("GDOC"); (2) the State of Georgia;[1] (3) J. Wayne Garner, the Commissioner of the GDOC; (4) A.G. Thomas, Director of Facilities Division of the GDOC; (5) Johnny Sikes, Warden of GSP; (6) J. Brady, Deputy Warden of GSP; (7) O.T. Ray, supervisor of guard shifts at GSP; (8) H. Whimbly, guard at GSP; (9) Margaret Patterson, guard at GSP; and (10) R. King, staff member at GSP. Goodman's complaint alleges, *inter alia*, that the defendants, in their individual and official capacities, were deliberately indifferent to his (1) serious medical needs and (2) conditions of confinement at GSP, in violation of the Eighth Amendment. Goodman sought monetary damages.

Goodman further claims that the defendants discriminated against him on the basis of his disability in violation of Title II of the ADA. Goodman sought both injunctive relief and monetary damages on his ADA claims.[2]

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[1] Goodman did not originally name the State of Georgia as a defendant, but after reviewing the complaint, the magistrate judge recommended that the State of Georgia be joined as a defendant to Goodman's ADA claims. As noted later, the proper defendant on Goodman's ADA claims for injunctive relief is actually Warden Johnny Sikes, in his official capacity.

[2] Goodman's complaint specifically prayed for attorney's fees, declaratory and injunctive relief, and punitive and compensatory damages in the amount of $600,000 from each individual defendant.

Because we are reviewing the dismissal of Goodman's Eighth-Amendment claims, we outline the factual allegations in his complaint, assuming all allegations to be true. *Cotton v. Jenne*, 326 F.3d 1352, 1357 (11th Cir. 2003) ("In reviewing a complaint, we accept all well-pleaded factual allegations as true and construe the facts in the light most favorable to the plaintiff").

B. Conditions at GSP

Goodman is housed in a high/maximum security section of GSP, the K-Building. Prison officials claim that Goodman "was assigned to . . . the Special Management Unit [K-Building] both because of his continuous disruptive conduct and the special requirements associated with his being wheelchair bound."

Goodman is kept in his "K-1 unit" cell, measuring twelve-feet long by three-feet wide, for twenty-three to twenty-four hours per day. While Goodman has had some disciplinary problems in the past, Goodman's allegations about the size of his cell appear to be unrelated to disciplinary issues. Instead, this is apparently the size of his cell whether or not he is in disciplinary isolation.[3]

According to Goodman, GSP does not provide reasonable accommodations for his paraplegia. Specifically, Goodman claims that the prison "lacks facilities for the disabled for hygiene, drinking and performing body excretion functions" and that GSP "is in a serious state of

[3] In a declaration attached to a motion for a TRO, Goodman avers that he once was in solitary confinement for forty-two straight days.

disrepair and fail[s] to meet minimal health and safety needs of the Plaintiff."

Beyond the inadequate prison conditions, Goodman claims that he has been denied access to "services, programs, and activities" at GSP by the defendants because of his disability. Specifically, Goodman states that the defendants have discriminated against him, based on his disability, because they have "refused and/or denied and/or excluded him from participation in MH/MR services, programs, and activities of the prison."

Further, Goodman claims that he "could be more appropriately treated in [a] more integrated community setting," and that his continued confinement in the "segregated environment" is "unlawful disability-based discrimination." In this regard, Goodman also contends that the classification procedures for the prison are inadequate because "a substantial number of prisoner[s] . . . are placed in maximum custody, when lesser degrees of custody would suffice." Goodman states that the classification procedures are inadequate because "there are insufficient staff members to give adequate time to each case, and staff members are inadequately trained."

Goodman provides numerous examples of the manner in which the prison conditions at GSP are inadequate for the disabled. Specifically, Goodman claims that he is unable to turn his wheelchair around inside of his twelve-foot-by-three-foot cell, and, thus, is virtually immobile. Goodman also alleges that he is unable to use his toilet, his bed, or the shower without assistance, and that the GSP prison officials or guards do not provide him with assistance. In fact, according to Goodman, he has been

forced to sit in his own bodily waste for long periods of time because none of the guards was willing to assist him.

In his complaint, Goodman also states that he has suffered "long periods of deprivation of basic amenities," such as "showers, baths, adequate ventilation or heating, recreation, work, medical and MH/MR care, laundry service, cleaning service, and phone service." Furthermore, Goodman states that he does not have access to the windows of his cell, the wall electrical plugs of his cell, and that GSP does not have wheelchair-accessible routes or rooms throughout the prison. Goodman also details the programs he has been denied access to, including: "counseling services, educational services, college program, vocational training, recreation activities, freedom of movement in the unit and institution, television, phone calls, entertainment, and religious rights."

C. Specific Instances of Injury

According to Goodman, there have been instances in which he was injured trying to use the toilet or the shower because the toilets and the showers do not have supports for disabled prisoners, and the prison staff did not provide him the necessary assistance. For example, Goodman states that on August 26, 1998, he had to "hurl" himself from his wheelchair onto the toilet, and that the toilet seat was not stabilized or secure. When he tried to return to his wheelchair from the toilet, Goodman states that he "slipped and fell onto the floor causing an epileptic seizure, and. . . . [he] broke his right toe and crushed his right knee."

Goodman claims that, on May 12, 1999, he "had a [bowel movement] and urine, on himself," and that he

requested cleaning supplies from "S.M.U. Capt. Mr. Brown, Mr. Smith, and Mr. Hall," and assistance in cleaning his wheelchair and cell, but all of them refused. He states that he was "forced to live in a cell where the floor was smeared with defecation and urine.... He was required to live and sit in his own body waste," while being refused repeated requests for cleaning supplies and assistance.

Goodman claims that, on May 14, 1999, he "broke his left foot and crushed his left knee," while trying to transfer himself to the toilet from his wheelchair. Goodman alleges that Captain Brown denied his requests for help cleaning his cell and for medical care.

Goodman also describes how he was harmed in the showering facility at GSP because it was without adequate support for prisoners with disabilities. On April 8, 1998, Goodman states that "C.O. II Whimbly took a toilet set into the shower for the Plaintiff to sit on while showering, but the toilet seat is not accessible. Plaintiff was trying to transfer from his [wheelchair] to the toilet chair but the toilet seat turned over and he fell to the floor and was hurt at [the] head, neck, [and] left arm."[4] Goodman also claims that he was denied adequate medical care following this incident.

Goodman further claims that the prison officials have not taken appropriate measures to safely transport inmates with disabilities. Goodman describes one occasion in which he was transferred from GSP to the federal court

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[4] It appears that Goodman is occasionally given a "toilet set" while in the shower, but that he cannot reach the seat of the toilet set without assistance.

building in Atlanta, Georgia, in a vehicle that was not equipped for wheelchair-bound passengers. Specifically, Goodman states that on May 5, 1998, he was "forced to ride handcuffed and shackled in the back of a van without seatbelts or restraints," and that "the seat which he was seated in was not stabiled [sic] or secure." As a result, Goodman states that he "fell to the floor and lost consciousness several times," and that he "suffer[ed] injures [sic] and pains at head, neck, back, stomach and legs." Goodman also states that upon his return, he made a request to Officer Hays and R. Smith "to see someone from medical . . . but medical refused to see or examine [him]."

In addition to Goodman's allegations that the defendants have purposefully denied him medical treatment, Goodman states that he has been denied catheters and rehabilitative therapy. He also claims that he has an asthma and a bronchitis condition that are aggravated by the air quality of his cell. Despite his requests for a change, the air in Goodman's cell is heated in the summer with high humidity and little ventilation and cooled in the winter, and Goodman has "a very hard time trying to breath inside of [the] cell." Finally, Goodman claims that the defendants have failed "to provide any assistance in preventing dangerous bedsores," and that he has been denied appointments with mental-health counselors, despite making numerous requests. In fact, Goodman asserts that he was forced to live under inhumane conditions; namely, in his cell without clothing under very cold temperatures.

With regard to these allegations, Goodman claims that GSP officials – Warden Sikes, Deputy Warden Brady, Supervisor Ray, Dr. Lowry, Dr. Mailloux, Barbara Werth, L. Waters, J. Bradford, J. Paris, and Lynn O. Smith – "had

knowledge and notice that [Goodman] was not secured, safe or stabilized in this cell," and that "despite this knowledge of his precarious and perilous placement within the prison cell the above named agents proceeded to house him in a prison cell which was in total disregard of his health, safety and well-being."

D. Dismissal of Goodman § 1983 Claims

As provided for in 28 U.S.C. § 1915A, the magistrate judge reviewed Goodman's complaint for cognizable claims. With respect to the § 1983 claims, the magistrate judge concluded that Goodman's allegations were vague and constituted insufficient notice pleading under Federal Rule of Civil Procedure 8. Specifically, the magistrate judge stated that Goodman's complaint did not "set forth a short, plain statement of the facts as to each defendant," and was deficient because it did not state "what specific constitutional violations occurred, the specific acts committed by each defendant that resulted in a particular constitutional violation, or on what date these alleged acts occurred." Thus, the magistrate judge recommended that the § 1983 claims against all defendants be dismissed pursuant to 28 U.S.C. § 1915A(b)(1) and 28 U.S.C. § 1915(e)(2)(B)(ii). The magistrate judge alternatively noted that the GDOC, as a state agency, is immune from a § 1983 suit under the Eleventh Amendment.

With respect to Goodman's ADA claims, the magistrate judge stated that his suit against the GDOC is actually against both the State of Georgia and the GDOC. The magistrate judge pointed out that the ADA applies to services, programs, and activities of "a public entity," making the State of Georgia a proper defendant for

Goodman's ADA claims. Thus, the magistrate judge recommended that the ADA claims be allowed to proceed against the GDOC and that the State of Georgia be joined as a defendant.

Noting that the United States Supreme Court had not addressed the question of whether the application of the ADA to state prisons was a constitutional exercise of Congressional power under the Commerce Clause or under the Fourteenth Amendment, the magistrate judge determined that Goodman's allegations "arguably stated a colorable claim for relief under 42 U.S.C. § 12131."

On August 20, 1999, the district court, in a one-page order, adopted the magistrate judge's recommendations and dismissed Goodman's § 1983 claims against all defendants and dismissed the ADA claims against all defendants, except for his ADA claims against defendants the GDOC and the State of Georgia. Goodman was not given an opportunity to amend his complaint.

E. Summary Judgment on Goodman's ADA Claims

Following the dismissal of Goodman's § 1983 claims, the parties filed cross motions for summary judgment as to his ADA claims.[5] In support of his summary judgment

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[5] Throughout the summary-judgment stage, some of the pleadings and orders do not name both defendants State of Georgia and the GDOC. However, we construe those pleadings as filed by both defendants and those orders as relating to both defendants because both defendants were the named defendants when the district court ordered that the ADA claims proceed to summary judgment and because both defendants appear on subsequent court documents.

motion, Goodman attached a statement of undisputed facts and his own and three other inmates' affidavits, which mirrored the allegations in his complaint, including such statements as: (1) Goodman was kept in his small cell in K-Building twenty-three hours per day; (2) Goodman was denied the full range of all privileges and rights to which other inmates in similar security classifications have access; (3) Goodman was denied access to medical care and treatment; (4) the prison was "not properly equipped to secure and house handicapped patients," nor was it wheelchair-accessible; and (5) Goodman had injured himself on a number of occasions trying to transfer to his cell toilet.

In response, defendants the State of Georgia and the GDOC denied most of Goodman's statement of undisputed facts and disagreed with Goodman's affidavits. The defendants also sought summary judgment with respect to Goodman's ADA claims, arguing that: (1) the State of Georgia had immunity from his ADA claims for monetary damages under the Eleventh Amendment; (2) his ADA claims for injunctive relief were moot; (3) the ADA did not apply to state prisons; (4) his claims failed on the merits; and (5) his claims were foreclosed by the Prison Litigation Reform Act ("PLRA").

On February 10, 2000, the magistrate judge recommended that both motions be denied, determining that: (1) states are not immune to suit brought under the ADA; (2) Goodman's claim for injunctive relief was not moot despite his transfer; and (3) there were issues of fact. The magistrate judge identified the issues of fact, as follows: (1) whether the defendants reasonably accommodated Goodman's disability; (2) whether Goodman was a "qualified

individual" under the ADA; and (3) whether Goodman's claim for mental suffering was foreclosed by the PLRA.

On March 6, 2000, the district court adopted the magistrate judge's report and denied Goodman's and the defendants' motions for summary judgment.[6] On June 14, 2001, the parties consented to trial by the magistrate judge. On October 22, 2001, the State of Georgia and the GDOC again moved for summary judgment based on and due to the then-new Supreme Court decision in *Board of Trustees of the University of Alabama, et al. v. Garrett,* 531 U.S. 356, 121 S. Ct. 955 (2001).

On December 12, 2001, the magistrate judge granted the State of Georgia and the GDOC's joint motion for summary judgment, determining that Goodman's claims for monetary damages under the ADA were precluded by the Eleventh Amendment and that his claims for injunctive relief were rendered moot due to his transfer from GSP to Valdosta State Prison.

Goodman appeals the district court's dismissal of his § 1983 claims and the grant of summary judgment on his ADA claims for monetary damages and injunctive relief.[7]

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[6] Goodman also filed a number of emergency motions for injunctive relief when transferred to different prisons claiming the same violations he alleged in his complaint; all of the motions were denied by the district court.

[7] Goodman's complaint also alleges: (1) racial discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e17, and the Equal Protection Clause; (2) violations of the Due Process Clause; (3) retaliatory action by prison officials as a result of his filing lawsuits; (4) unsanitary/inadequate food conditions and preparation; and (5) unsafe conditions in not having fire drills. While Goodman appeals the dismissal of these claims as well, the district

(Continued on following page)

II. STANDARD OF REVIEW

We review *de novo* the dismissal of a complaint for failure to state a claim under 28 U.S.C. § 1915A(b)(1). *Leal v. Ga. Dep't of Corr.*, 254 F.3d 1276, 1278 (11th Cir. 2001).[8] In reviewing the dismissal of a complaint, we accept all the alleged facts as true and view them in the light most favorable to the non-moving party. *Cottone v. Jenne*, 326 F.3d 1352, 1357 (11th Cir. 2003). Dismissal of the complaint is not appropriate "unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Marsh v. Butler County, Ala.*, 268 F.3d 1014, 1022 (11th Cir. 2001) (*en banc*) (internal quotation marks and citations omitted); *see also GJR Investments, Inc. v. County of Escambia, Fla.*, 132 F.3d 1359, 1367 (11th Cir. 1998) ("[w]hile Fed. R. Civ. P. 8 allows a plaintiff considerable leeway in framing its complaint, this circuit, along with others, has tightened the application of Rule 8 with respect to § 1983 cases in an effort to weed out nonmeritorious claims, requiring that a § 1983 plaintiff allege with some specificity the facts which make out its claim.").

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court did not err in dismissing these claims, and we affirm their dismissal without further discussion.

[8] In *Leal*, this Court first considered the issue of the applicable standard of review for an appeal of a dismissal pursuant to 28 U.S.C. § 1915A(b)(1). 254 F.3d at 1278. This Court concluded that *de novo* review was appropriate because § 1915A(b)(1) tracked the language of 28 U.S.C. § 1915(e)(2)(B)(ii). *Leal*, 254 F.3d at 1279. This Court previously had determined that because § 1915(e)(2)(B)(ii) tracks the language of Federal Rule of Civil Procedure 12(b)(6), it should be subject to the same, well-settled *de novo* review standard for Rule 12(b)(6) dismissals. *Id.* at 1278.

We review the grant of summary judgment *de nova*, viewing all evidence and factual inferences therefrom in the light most favorable to the non-moving party. *Wascura v. City of South Miami*, 257 F.3d 1238, 1242 (11th Cir. 2001).

III. SECTION 1983 CLAIMS

Regarding the dismissal of Goodman's § 1983 claims for monetary damages, we affirm the district court's dismissal as to: (1) the GDOC; (2) Garner and Thomas, in their individual and official capacities; and (3) the remaining GSP defendants in their official capacities.[9]

We affirm the dismissal as to the GDOC because the Eleventh Amendment bars a § 1983 claim against the GDOC. *Stevens v. Gay*, 864 F.2d 113, 115 (11th Cir. 1989) (citing *Alabama v. Pugh*, 438 U.S. 781, 782, 98 S. Ct. 3057, 3057 (1978) (per curiam)).

With regard to Commissioner Garner and Director Thomas, Goodman has alleged no factual basis or theory that states a claim for any form of relief against these two men who work at the state level and not directly at GSP. Therefore, we affirm the district court's dismissal of Goodman's § 1983 claims against Gamer and Thomas, in their individual and official capacities.

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[9] As stated earlier, the State of Georgia is a defendant in this case for the purposes of Goodman's ADA claims only. While Goodman clearly focuses on both monetary damages and injunctive relief under the ADA, his Eighth-Amendment claims under § 1983 appear to be focused on obtaining monetary damages.

As to the remaining defendants, who are all GSP prison officials, suits for monetary damages under § 1983 are valid only against prison officials in their individual, not official, capacities. *See Will v. Mich. Dep't of State Police,* 491 U.S. 58, 71, 109 S. Ct. 2304, 2312 (1989) (stating "neither a State nor its officials acting in their official capacities are 'persons' under § 1983"); *D'Aguanno v. Gallagher,* 50 F.3d 877, 879 (11th Cir. 1995) (permitting suits under § 1983 for monetary damages against state officials in their individual capacities). Consequently, we affirm the district court's dismissal of Goodman's § 1983 claims against the remaining GSP defendants in their official capacities.

However, we conclude that the district court erred in dismissing some of Goodman's § 1983 claims for monetary damages against the remaining individual defendant prison officials at GSP, in their individual capacities. We do so for the following reasons.

A. Eighth Amendment Principles

"Whether one characterizes the treatment received by [a partially paraplegic inmate] as inhumane conditions of confinement, failure to attend to his medical needs, or a combination of both, it is appropriate to apply the 'deliberate indifference' standard. . . . " *Evans v. Dugger,* 908 F.2d 801, 804-06 (11th Cir. 1990) (citations omitted). In defining the deliberate indifference standard, the Supreme Court stated:

> [A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk

> to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.

Farmer v. Brennan. 511 U.S. 825, 837, 114 S. Ct. 1970, 1979 (1994).

Courts use a two-part analysis in Eighth-Amendment challenges to conditions-of-confinement and failure-to-attend-to-medical-needs cases. Under the objective component, a prisoner must prove the condition he complains of is sufficiently serious to violate the Eighth Amendment. *Hudson v. McMillian*, 503 U.S. 1, 8, 112 S. Ct. 995, 999 (1992). Specifically, a prisoner must prove "a serious medical need" or the denial of "the minimal civilized measure of life's necessities." *Chandler v. Crosby*, No. 03-12017, Slip Op. at 3369 (11th Cir. August 6, 2004); *Farrow v. West*, 320 F.3d 1235, 1243 (11th Cir. 2003); *see Rhodes v. Chapman*, 452 U.S. 337, 347, 101 S. Ct. 2392, 1000 (1981). "The challenged prison condition must be 'extreme'" and must "pose an unreasonable risk of serious damage to his future health." *Chandler*, Slip Op. at 3369 (quoting *Hudson*, 503 U.S. at 9, 112 S. Ct. at 1000).

Under the subjective component, the prisoner must prove that the prison official acted with "deliberate indifference." *Farmer*, 511 U.S. at 836, 837, 114 S. Ct. at 1978, 1979; *Hudson*, 503 U.S. at 8, 112 S. Ct. at 999; *Wilson v. Seiter*, 501 U.S. 294, 303, 111 S. Ct. 2321, 2327 (1991). To show deliberate indifference, the prisoner must show that the defendant prison official "'acted with a sufficiently culpable state of mind'" with regard to the serious prison condition or serious medical need in issue. *Chandler*, Slip Op. at 3369 (quoting *Hudson*, 503 U.S. at 8, 112 S. Ct. at 999). Negligence does not satisfy this standard. *Id.* A

prisoner need not prove the prison official acted with "'the very purpose of causing harm or with knowledge that harm [would] result.'" *Id.* (quoting *Farmer,* 511 U.S. at 835, 114 S. Ct. at 1970). However, a prison official may escape liability for known risks "if [he] responded reasonably to the risk, even if the harm ultimately was not averted." *Id.* at 844, 114 S. Ct. at 1982-83 (quotation marks and citations omitted).

B. Goodman's Allegations Under Section 1983

The magistrate judge and district court correctly noted that Goodman's complaint was less than a model of clarity. However, this is not a "pure" case of failure to state a claim. Rather, we conclude that the allegations contained in Goodman's complaint, TRO motions, and other court filings evidence sufficient allegations to proceed with a limited number of Eighth-Amendment claims under § 1983.

Although Goodman never formally requested leave to amend his complaint, Goodman's filings, taken as a whole, evidence a desire to add facts and substance to his allegations. For example, on May 24, 1999, Goodman filed a "Motion to Amend his Emergency Motion for T.R.O. and/or P.I." Under these circumstances, the act of dismissal, without leave to amend, was too severe a sanction. Rather, Goodman should have been given an opportunity to amend and streamline his complaint. *See generally Troville v. Venz,* 303 F.3d 1256, 1260 (11th Cir. 2002); *Magluta v. Samples,* 256 F.3d 1282, 1284 (11th Cir. 2001).

Therefore, we remand this case to the district court so that Goodman may be permitted to amend his § 1983 claims for Eighth-Amendment violations. However, we

caution Goodman that this is not an invitation to assert all of his purported Eighth-Amendment claims, some of which are obviously frivolous. Rather, three of his claims regarding his conditions of confinement and need for medical care, if true, should be the focus of his amended complaint.

First, Goodman alleges that he is not able to move his wheelchair in his cell. If Goodman is to be believed, this effectively amounts to some form of total restraint twenty-three to twenty-four hours-a-day without penal justification. *See Hope v. Pelzer*, 536 U.S. 730, 738, 122 S. Ct. 2508, 2514-15 (2002). Second, Goodman has alleged several instances in which he was forced to sit in his own bodily waste because prison officials refused to provide assistance.[10] Third, Goodman has alleged sufficient conduct to proceed with a § 1983 claim based on the prison staff's supposed "deliberate indifference" to his serious medical condition of being partially paraplegic; that is, knowingly providing no physical therapy and inadequate medical treatment, systematic denial of access to virtually all prison programs and activities because of his disability, and woefully inadequate and inhumane prison facilities

[10] Courts typically accord particular weight to exposure to human waste in condition-of-confinement cases. *See McBride v. Deer*, 240 F.3d 1287, 1292 (10th Cir. 2001) (finding "sufficiently serious conditions of confinement" where inmate in feces-covered cell for three days); *McCord v. Maggio*, 927 F.2d 844, 848 (5th Cir. 1991) ("unquestionably a health hazard" to live in "filthy water contaminated with human waste"); *Fruit v. Norris*, 905 F.2d 1147, 1151 (8th Cir. 1990) ("courts have been especially cautious about condoning conditions that include an inmate's proximity to human waste"); *Johnson v. Pelker*, 891 F.2d 136, 139 (7th Cir. 1989) (three days in cell with feces smeared on walls not within "civilized standards, humanity, and decency"); *LaReau v. MacDougall*, 473 F.2d 974, 978 (2nd Cir. 1972) ("Causing a man to live, eat, and perhaps sleep in close confines with his own human waste is too debasing and degrading to be permitted.").

for the disabled, such as toilets without the necessary support or handrails. *See Miller v. King,* No. 02-13348, slip op. at ___ (Sept. ___, 2004); *Evans v. Dugger,* 908 F.2d 801, 804-06 (11th Cir. 1990).

As we did in *Magluta v. Samples,* 375 F.3d 1269 (11th Cir. 2004),

> [w]e emphasize the hypothetical nature of our holding in this case. If the defendants at later stages of this litigation, *e.g.,* at summary judgment, can establish that legitimate reasons do in fact exist and/or the conditions of the confinement are not as harsh or prolonged as alleged, then a different case will be presented. Additionally, although [Goodman] has specifically alleged that he advised each defendant personally of the violations of his constitutional rights only to be rebuffed, and that each had personal involvement in relevant decisions, development of the record at summary judgment may reveal that one or more of the defendants in fact had no personal involvement or liability.

Id. at 1276 n.5.

IV. ADA Claim for Injunctive Relief

We first affirm the magistrate judge's grant of summary judgment to all the defendants on Goodman's ADA claims for monetary damages as barred by the Eleventh Amendment. *Miller v. King,* No. 02-13348, slip op. at___. The magistrate judge, however, erred in determining that Goodman's ADA claims for injunctive relief under Title II were moot for the following reasons.

It is true that "[t]he general rule is that a prisoner's transfer or release from a jail moots his individual claim for declaratory and injunctive relief" *McKinnon v. Talladega Co.*, 745 F.2d 1360, 1363 (11th Cir. 1984) (citation omitted). The "capable of repetition, yet evading review" doctrine provides an exception to the general rule of mootness. That doctrine requires "a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein v. Bradford*, 423 U.S. 147, 149, 96 S. Ct. 347, 349 (1975). In *Preiser v. Newkirk*, 422 U.S. 395, 402-03, 95 S. Ct. 2330, 2334-35 (1975), the Supreme Court concluded that the "capable of repetition, yet evading review" doctrine would not apply in prison transfer cases if the likelihood of re-transfer was remote and speculative.

Since the filing of his lawsuit in 1999, Goodman has been transferred nine times: (1) July 1999, to Lee Arrendale State Prison; (2) November 1999, to Macon State Prison; (3) January 2000, to Baldwin State Prison; (4) February 2000, back to GSP; (5) March 2000, to Augusta State Medical Prison; (6) August 2000, to Hays State Prison; (7) March 2001, to Valdosta State Prison; (8) November 2003, to Ware State Prison; and (9) January 2004, back to GSP.[11] At oral argument, the government indicated that Goodman had been transferred again to Valdosta State Prison. However, this Court continues to list Goodman's address as GSP, given that we have received status-report requests from Goodman at GSP as recently as April 21, 2004.

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[11] The district court's docket sheet indicated a January 5, 2004, change of address for Goodman to GSP.

What is certain is that Goodman is either at GSP or the likelihood of his eventual transfer back to GSP is far from remote or speculative. Consequently, we conclude that the "capable of repetition, yet evading review" doctrine applies in this case and that Goodman's claims for injunctive relief under Title II of the ADA are not moot.

Therefore, this case is remanded to the district court to consider Goodman's claims for injunctive relief under Title II of the ADA. Because Goodman is already amending his complaint for the purposes of his § 1983 action, Goodman may also take this opportunity to present a clearer picture of his allegations for injunctive relief under Title II of the ADA. *See Miller,* No. 02-13348, slip op. at ___ (outlining the requirements for stating a claim under Title II of the ADA). Furthermore, the proper defendants on Goodman's ADA claims for injunctive relief should be Warden Sikes and Commissioner Garner, in their official capacities, not the State of Georgia or the GDOC.[12] *See Miller,* No. 02-13348, slip op. at ___.

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[12] Because Goodman has been transferred so many times and for judicial economy, we conclude that Goodman may also pursue his ADA claims for injunctive relief against Commissioner Garner. By so concluding, any subsequent transfer away from GSP would not render Goodman's ADA claims under Title II moot. *See Randolph v. Rodgers,* 253 F.3d 342, 345-46 (8th Cir. 2001) (prisoner's claims against the director of the state prison system were not moot upon transfer to another prison because the director had authority over the entire prison system). Further, the Commissioner has the power to provide funds in order to bring a particular prison, if ordered by a court, into ADA compliance or to transfer a prisoner to a prison that is ADA-compliant. *See* Ga. Code § 42-2-8 ("Subject to legislative appropriations, the commissioner shall also be authorized to make and execute any contract for the land acquisition, design, construction, operation, maintenance, use, lease, or management of a state correctional institution or for any services pertaining to the custody, care, and

(Continued on following page)

V. CONCLUSION

For all the above reasons, we vacate the dismissal of Goodman's § 1983 claims for Eighth-Amendment violations against the remaining six GSP officials, in their individual capacities, with regard to his assertions that: (1) he is left immobile in his cell for prolonged periods of time; (2) he is forced to spend significant time in his own waste because prison officials refuse to provide assistance; and (3) prison officials are deliberately indifferent to his needs as a partially paraplegic prisoner; that is, knowingly providing no physical, therapy and inadequate medical treatment, systematic denial of access to virtually all prison programs and activities because of his disability, and woefully inadequate and inhumane prison conditions for the disabled, such as toilets with the necessary support or handrails. In all other respects, we affirm the district court's dismissal of Goodman's § 1983 claims for Eighth-Amendment violations.

With respect to Goodman's ADA claims, we affirm the magistrate judge's grant of summary judgment as to Goodman's claims for monetary relief under Title II of the ADA against all defendants, but vacate the grant of summary judgment on Goodman's claims for injunctive relief under Title II of the ADA. The proper defendants on Goodman's ADA claims for injunctive relief are Warden

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control of inmates or other functions as are related to the discharge of these responsibilities. . . . "); Ga. Comp. R. & Reg. § 125-2-4.18(1) ("The Commissioner shall . . . have sole authority to transfer inmates from one correctional institution to any other institution."). Should Garner no longer be the Commissioner, the district court shall identify the current Commissioner and allow Goodman to substitute that state official as a defendant, in his official capacity, as to his ADA claims for injunctive relief.

Sikes and Commissioner Garner (or the current Commissioner), in their official capacities.

VACATED, REVERSED, and REMANDED, in part; AFFIRMED, in part.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA STATESBORO DIVISION

TONY GOODMAN, Plaintiff,	:	CIVIL ACTION NO.: CV699-012
vs.	:	
THE STATE OF GEORGIA, Defendant.	:	

ORDER

(Filed Dec. 20, 2001)

Plaintiff, an inmate currently confined at Valdosta State Prison in Valdosta, Georgia, filed this civil rights action pursuant to 42 U.S.C. § 1983 challenging the conditions of his confinement. Plaintiff alleges, inter alia, that the State of Georgia did not provide him with reasonable accommodations in violation of the Americans With Disabilities Act. Defendant has filed a Motion for Summary Judgment. (Dkt Nos. 88, 89, and 90.) Plaintiff has filed a Response and an Amended Response. (Dkt. Nos. 91, 92, and 93.)

STATEMENT OF FACTS

Plaintiff, a wheelchair-bound inmate, filed suit against the State of Georgia, among others, contending that the State violated Title II of the Americans With Disabilities Act. Specifically, Plaintiff contends that he was transferred from a medical prison to Georgia State Prison

which was not equipped to deal with his needs. He contends that he was placed in administrative segregation and was denied access to the law library, church, and gymnasium. He also contends that GSP did not have wheelchair accessible bathrooms, shower stalls, sinks, and entrances to buildings. Plaintiff alleges that he was deprived of counseling, education, vocational training, and recreation activities. Plaintiff has requested monetary and injunctive relief.

Defendant asserts that Plaintiff is prevented, by the Eleventh Amendment, from pursuing his ADA claim for money damages. Defendant also asserts that Plaintiff's request for injunctive relief does not state a claim upon which relief can be granted.

STANDARD OF DETERMINATION

Summary judgment should be granted only if "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The procedure for disposing of a summary judgment motion is well established. The Court may grant summary judgment to a party when, after a reasonable time for discovery, the evidence demonstrates that the nonmovant has failed to establish an essential element of his case. The party moving for summary judgment bears the initial burden of meeting this exacting standard. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S. Ct. 1598, 1608, 26 L. Ed. 2d 142 (1970) In applying this standard, the *Adickes* Court explained that a court should view the evidence and all factual inferences in the light most favorable to the party opposing the motion. All reasonable doubts regarding the facts should be resolved

in favor of the nonmovant. *Adickes*, 398 U.S. at 157, 90 S. Ct. at 1608.

Once the moving party has met this initial burden, the burden shifts to the opposing party to show that a genuine issue of material fact exists. *Celotex Corp. v. Catrell*, 477 U.S. 317, 324, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986). The opposing party may not simply rest upon mere allegations or denials of the pleadings. Rather, the nonmoving party must make a sufficient showing of facts to establish the existence of an essential element to his case on which he will bear the burden of proof at trial. *Id.*; *Barfield v. Brierton*, 883 F.2d 923, 933 (11th Cir. 1989). To oppose the motion sufficiently after the movant has met his initial burden, the nonmoving party must point to evidence in the record or present additional evidence in the form of affidavits or as otherwise provided in Rule 56 of the Federal Rules of Civil Procedure. *Riley v. Newton*, 94 F.3d 632, 639 (11th Cir. 1996). If the record presents factual issues, the Court must deny the motion and proceed to trial. *Environmental Defense Fund v. Marsh*, 651 F.2d 983, 991 (5th Cir. 1981).[1] Summary judgment is also inappropriate where the parties agree on the basic facts, but disagree about the inferences that should be drawn from these facts. *Lighting Fixture & Elec. Supply Co. v. Continental Ins. Co.*, 420 F.2d 1211, 1213 (5th Cir. 1969)

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[1] In *Bonner v City of Prichard*, 661 F 2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981

DISCUSSION AND CITATION OF AUTHORITY

I. Plaintiffs Claim For Monetary Damages.

The State of Georgia asserts that it is entitled to Eleventh Amendment immunity from money damages. The Supreme Court recently determined that the Eleventh Amendment prevents states and state entities from being sued for money damages under Title I of the Americans with Disabilities Act. *Board of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 121 S. Ct. 955, 960, 148, L. Ed. 2d 866 (2001). The *Garrett* decision addresses whether states are immune from Title I of the ADA, but does not mention state immunity from Title II suits, such as Plaintiff is pursuing here. *Garrett*, 121 S. Ct. at 960 n.1. In *Williamson v. Georgia Department of Human Resources, et. al.*, this Court concluded that states are also immune from suits under Title II. 150 F. Supp. 2d 1375 (S. D. Ga. 2001). Following the rubric established by the Supreme Court in *Garrett, Williamson* concludes that Congress did not identify a pattern of unconstitutional behavior by the States, and therefore did not abrogate traditional Eleventh Amendment immunity. *Williamson*, 150 F. Supp. 2d 1375, 1381. Plaintiff's claims for money damages against the State of Georgia are precluded by the Eleventh Amendment.

II. Plaintiff's Claim For Injunctive Relief.

Plaintiff has also, on numerous occasions, requested a preliminary injunction. Plaintiff has requested, as addressed by Defendant's first Motion for Summary Judgment, that he be transferred out of Georgia State Prison because it did not accommodate his needs as provided by the Americans with Disabilities Act. The record reflects

that Plaintiff was transferred from Georgia State Prison to Lee Arrendale State Prison prior to July 1999. (Dkt. No. 17.) Plaintiff was transferred to Macon State Prison prior to November 1999. (Dkt. No. 27.) Plaintiff was transferred to Baldwin State Prison in January 2000. (Dkt. No. 35.) He was transferred back to Georgia State Prison in February 2000. (Dkt. No. 39.) Plaintiff was moved to Augusta State Medical Prison in March 2000. (Dkt. No. 45.) Plaintiff notified the court of his transfer to Hays State Prison at the end of August 2000. (Dkt. No. 49.) Plaintiff was transferred to Valdosta State Prison in March 2001. (Dkt. No. 56.)

Plaintiff brought this claim in January 1999, claiming that Georgia State Prison did not comply with the Americans with Disabilities Act. Plaintiff was transferred out of GSP in July 1999, and has spent time in numerous institutions, including medical prisons since the time he filed his complaint. Currently, Plaintiff is incarcerated in Valdosta State Prison. Plaintiff's claim for injunctive relief has been rendered moot by his transfer from Georgia State Prison. *Minnesota Humane Society v. Clark*, 184 F.3d 795 (8th Cir. 1995); *McAlpine v. Thompson*, 187 F.3d 1213 (10th Cir. 1999).

CONCLUSION

For the above and foregoing reasons, summary judgment is **GRANTED** to Defendant.

SO ORDERED, this 20th day of December, 2001.

/s/ James E. Graham
JAMES E. GRAHAM
UNITED STATES MAGISTRATE JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-10168-GG

TONY GOODMAN,

Plaintiff-Appellant,

versus

O. T. RAY, et al.,

Defendants,

THE STATE OF GEORGIA,

Defendant-Appellee,

UNITED STATES OF AMERICA,

Intervenor.

On Appeal from the United States District Court
for the Southern District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC (Opinion _____, 11th Cir., 19__, ___ F.2d ___).

(Filed Dec. 9, 2004)

Before: CARNES, HULL and HILL, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Frank M. Hall
UNITED STATES CIRCUIT JUDGE

APPENDIX D

The Constitution of the United States provides, in part:

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * *

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The Americans With Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.*, provides in part:

§ 12101. Findings and purpose

(a) Findings

The Congress finds that-

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary

qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose

It is the purpose of this chapter –

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

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§ 12131. Definitions

As used in this subchapter:

(1) Public entity

The term "public entity" means –

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 24102(4) of title 49).

(2) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

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§ 12132. Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

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§ 12133. Enforcement

The remedies, procedures, and rights set forth in section 794a of title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.

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§ 12202. State immunity

A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter. In any action against a State for a violation of the requirements of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

Supreme Court, U.S.
FILED
APR 15 2005
OFFICE OF THE CLERK

No. 04-1203
No. 04-1236

In The Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

STATE OF GEORGIA, ET AL.

TONY GOODMAN,

Petitioner,

v.

STATE OF GEORGIA, ET AL.

On Petition For Writs Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131 *et seq.*, validly abrogates states' Eleventh Amendment immunity as applied to suits by state prison inmates regarding conditions of confinement.

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STATEMENT OF THE CASE

Petitioner Goodman, a disabled convicted felon currently serving a sentence for aggravated assault, possession of a firearm by a convicted felon and possession of a controlled substance with intent to distribute, filed the present action on January 6, 1999, seeking damages and injunctive relief for alleged violations of the United States Constitution and the Americans With Disabilities Act, 42 U.S.C. §12101 et seq. (ADA), in the District Court for the Southern District of Georgia. Mr. Goodman filed this suit and a number of emergency motions pro se and appealed the District Court's ruling to the Eleventh Circuit. Counsel was appointed for the first time by the appellate court.[1]

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[1] Plaintiff has filed at least 60 pro se federal actions since his original incarceration in 1991, including the following: *Goodman v. Murray*, Case #5:1992CV00082 (M.D. Ga., filed 1992); *Goodman v. Scroggy*, Case 1:1992CV00122 (S.D. Ga., 1992); *Goodman v. Scroggy*, 1:1992CV00149 (S.D. Ga. 1992); *Goodman v. Bridges*, 1:1993CV00017 (S.D. Ga., 1993); *Goodman v. Garner*, 6:1997MC00046 (S.D. Ga., 1997); *Goodman v. State of Ga.*, 6:1997CV00065 (S.D. Ga., 1997); *Goodman v. Garner*, 6:1997CV00107 (S.D. Ga., 1997); *Goodman v. King*, 2:1998MC00032 (S.D. Ga. 1998); *Goodman v. Lewis*, 2:1998MC00050 (S.D. Ga. 1998); *Goodman v. Mailloux*, 6:1998MC00065 (S.D. Ga. 1998); *Goodman v. King*, 6:1998CV00118 (S.D. Ga. 1998); *Goodman v. Bradford*, 6:1998CV00137 (S.D. Ga. 1998); *Goodman v. Lewis*, 6:1998CV00153 (S.D. Ga. 1998); *Goodman v. Ray*, 6:1999MC00001 (S.D. Ga. 1999); *Goodman v. State of Ga.*, 6:1999CV00021 (S.D. Ga. 1999); *Goodman v. Wood*, 2:1999CV00165 (N.D. Ga. 1999); *Goodman v. Morgan*, 2:1999CV00208 (N.D. Ga. 1999); *Goodman v. Wetherington*, 5:1999CV00443 (M.D. Ga. 1999); *Goodman v. Lewis*, 7:2001CV00023 (M.D. Ga. 2001); *Goodman v. Lewis*, 7:2001CV00044 (M.D. Ga. 2001); *Goodman v. Lewis*, 7:2001CV00081 (M.D. Ga. 2001); *Goodman v. Kemp*, 1:1987CV01195 (N.D. Ga. 1987); *Goodman v. Riggins*, 3:1991CV0004 (N.D. Ga. 1991); *Goodman v. Riggins*, 3:1991CV00097 (N.D. Ga. 1991); *Goodman v. Cantrell*, 3:1991CV00116 (N.D. Ga. 1991); *Goodman v. Brinson*, 4:1991CV00247 (N.D. Ga. 1991); *Goodman v. Cantrell*, 3:1991CV01117 (N.D. Ga. 1991); *Goodman v. Brinson*, 1: 1991CV02302

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In the present case, Goodman's complaint, which the appeals court said "was less than a model of clarity," (Petitioners' Appendix A, p. 16a), alleged the section of Georgia State Prison where he resided in 1998 "lacks facilities for the disabled 'for hygiene, drinking, and performing bodily excretion functions.'" Petitioners' Appendix A, p. 4a. He also, as the Court points out, alleges he has suffered "long periods of deprivation of basic amenities," such as, "showers, baths, adequate ventilation or heating, recreation, work, medical and MH/MR care,

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(N.D. Ga. 1991); *Goodman v. Brinson*, 4:1992CV00044 (N.D. Ga. 1992); *Goodman v. Brinson*, 4:1992CV00048 (N.D. Ga. 1992); *Goodman v. Brinson*, 4:1992CV00049 (N.D. Ga. 1992); *Goodman v. Brinson*, 1:1992CV00083 (N.D. Ga. 1992); *Goodman v. Scroggy*, 3:1993CV00026 (N.D. Ga. 1993); *Goodman v. Ga. Board of Pardons and Paroles*, 1:1993CV00810 (N.D. Ga. 1993); *Goodman v. Hipkens*, 1:1993CV02249 (N.D. Ga. 1993); *Goodman v. Proctor*, 3:1995CV00120 (N.D. Ga. 1995); *Goodman v. Johnson*, 1:1995CV03083 (N.D. Ga. 1995); *Goodman v. Beddingfield*, 1:1996CV00088 (N.D. Ga. 1996); *Goodman v. Moore*, 2:1998MC00044 (S.D. Ga. 1998); *Goodman v. Brodford*, 6:1998CV00192 (S.D. Ga. 1998); *Goodman v. Brodford*, 6:1998CV00197 (S.D. Ga. 1998); *Goodman v. Ga. Board of Pardons and Paroles*, 1:1998CV02042 (N.D. Ga. 1998); *Goodman v. Hammonds*, 1:1998CV02528 (N.D. Ga. 1998); *Goodman v. Judge Moore*, 2:1999CV0004 (S.D. Ga. 1999); and *Goodman v. Lewis*, 3:2001CV00077 (N.D. Ga. 2001); *Goodman v. Howerton*, 5:2003CV00028 (S.D. Ga., 2003); *Goodman v. Ferrell*, 5:2003CV00039 (S.D. Ga. 2003); *Goodman v. Smith*, 6:2003CV00158; *Goodman v. Georgia Correctional*, 1:2002CV00172 (S.D. Ga. 2002); *Goodman v. Howerton*, 1:2003CV00973 (N.D. Ga. 2003); *Goodman v. Smith*, 1:2004CV02705 (N.D. Ga. 2004); *Goodman v. Huntfree*, 1:2003CV03551 (N.D. Ga. 2003); *Goodman v. Donald*, 6:2004CV00127 (S.D. Ga. 2004); *Goodman v. Smith*, 6:2004CV00139 (S.D. Ga. 2004); and *Goodman v. Ga. Board of Pardons and Paroles*, 1:2004CV01221 (N.D. Ga. 2004). Defendants further note that this Plaintiff has had at least five appeals before the Eleventh Circuit dismissed for frivolity: *Goodman v. King*, Case #99-8031-B (11th Cir. 1999); *Goodman v. Judges Moore and Graham*, #99-10407-B (11th Cir. 2000); *Goodman v. Brodford*, #99-10310-B (11th Cir. 2000); *Goodman v. State of Ga.*, #98-8380-A (11th Cir. 1999); and *Goodman v. Garner*, #98-9245 (11th Cir. 1999).

laundry service, cleaning service, and phone service." *Id*, at 5a. He also said he was forced to sit, immobilized, in his cell for long periods of time because the cell was too small, and that he had to sit in his own waste because he could not transfer from his wheelchair to the cell toilet.[2] The magistrate recommended dismissal of Mr. Goodman's 42 U.S.C. §1983 constitutional claims because they were overly vague and insufficient under Rule 8. Initially, the entire ADA claim was allowed to proceed, but the magistrate recommended summary judgment on the ADA claim based on this Court's decision in *Board of Trustees of the University of Alabama, et al. v. Garrett*, 531 U.S. 356, 121 S.Ct. 955 (2001) as to Plaintiff's claim for monetary damages. As to his claim for injunctive relief, the magistrate recommended dismissal due to mootness because Goodman had been moved to another prison. The District Court followed the recommendations.

Goodman appealed, and the Eleventh Circuit ruled the district court erred in dismissing some of Goodman's §1983 claims for monetary damages. *Id.* p. 14a. Specifically, the Eleventh Circuit vacated the dismissal of Goodman's §1983 claims for damages where he alleged Eighth Amendment violations by prison officials who Goodman accused of leaving him immobile in his cell for prolonged periods, forcing him to sit in his own waste, and knowingly denying him access to medical treatment and prison programs and activities. The Court also said he was

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[2] While the Eleventh Circuit could not weigh Goodman's factual allegations that he lacks the ability to transfer from his wheelchair to his toilet, in the criminal case for which he is now in prison Mr. Goodman shot at his girlfriend and then removed himself from the wheelchair and beat her. *Goodman v. State*, 237 Ga. App. 795 (516 S.E.2d 824) (1999).

entitled to be heard on his claim for injunctive relief under the ADA. *Id.* at 22a.

As to Goodman's ADA claim for monetary relief, the Court affirmed the magistrate judge's grant of summary judgment in one sentence: "We first affirm the magistrate judge's grant of summary judgment to all the defendants on Goodman's ADA claims for monetary damages as barred by the Eleventh Amendment. *Miller v. King*, [cit.]." Nothing is said of the claim after that point. Certiorari has not been sought on any other issue.[3]

SUMMARY OF THE ARGUMENT

Petitioner Goodman says "[t]his case concerns a matter of longstanding disagreement in the lower courts." Brief of Petitioner Goodman, p. 6. Respondents disagree and point out that the conflict in issue in this case can hardly be described as "longstanding." Instead, the disagreement in the lower courts at issue here is between the

[3] Petitioner United States alludes to the fact that Goodman's complaint includes claims under Constitutional amendments other than the Eighth – including the First, Fifth and Sixth Amendments. While it is true that Goodman invoked those amendments, his claim of injury related to having to sit in his own waste for prolonged periods, having to live in a cell where he could not move his wheelchair, and being denied access to prison programs. He does not sufficiently allege injury to his right to access the courts. For example, he did not show he was unable to file suits or motions or was unable to access a courtroom. The Eleventh Circuit, in a footnote, specifically upheld the District Court's dismissal of Goodman's racial discrimination, due process, retaliation, inadequate food preparation, and unsafe conditions for not having fire drills "without further discussion." Petitioners' Appendix A, p. 12a, fn. 7. Neither petitioner seeks certiorari for this part of the decision.

Ninth Circuit and the Third and Eleventh Circuits regarding Congress's abrogation of the States' Eleventh Amendment immunity in the Americans with Disabilities Act (ADA) under §5 of the Fourteenth Amendment as applied to state prisoners' prison condition claims in the wake of this Court's decision less than a year ago in *Tennessee v. Lane*, 124 S.Ct. 1978 (2004). The Circuits' disagreement on this issue can be measured in months, if not weeks, and is still in its infancy at this point, with other circuits yet to decide the issue.

Respondents also disagree with Petitioner Goodman's assertion that this case "presents the ideal vehicle to resolve [the] conflict in the Circuits." Brief of Petitioner Goodman, p. 7. The present case relies entirely on another decision handed down by the Eleventh Circuit, *Miller v. King*, 384 F.3d 1248 (11th Cir. 2004) to say the Petitioner's ADA Title II claim for damages cannot go forward. *Miller*, as Petitioner United States admits, is still pending a motion for rehearing before the Eleventh Circuit.

Additionally, Respondents do not consider this case ideal to resolve the conflict since this case is an unpublished decision which contains only one sentence bearing on the issue in question. The sentence merely cites to the still-in-the-pipeline *Miller* decision, wherein the three-judge panel issued a lengthy and detailed analysis of the ADA, the Eleventh Amendment, and *Tennessee v. Lane*, *supra*, before deciding Congress did not properly abrogate the States' Eleventh Amendment immunity when it developed Title II of the ADA as applied to prison inmates' conditions of confinement.

Finally, Respondents argue against certiorari in the present case because the Eleventh Circuit properly analyzed

the ADA and this Court's precedent regarding abrogation of Eleventh Amendment immunity. The Eleventh Circuit properly followed the process used by this Court in *Lane*, and certiorari is not necessary.

For these reasons, the petitions in the present case should be denied.

REASONS FOR NOT GRANTING THE WRITS

I. The Conflict Between The Circuits Is Not Sufficiently Ripe, and the Petition Should Be Denied.

While there is a conflict between decisions of the Ninth Circuit and the Third and Eleventh Circuits, Respondents argue the conflict is not ripe for a writ of certiorari at the present time. Supreme Court Rule 10(a) clearly opens the door for this Court to grant certiorari where "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter," but there is by no means a mandate. The Court does not necessarily grant certiorari in a case where a conflict exists, and it should not do so here.

"Rule 10 of the Rules of the Supreme Court 'indicate the character of reasons' that will be considered in granting or denying petitions for certiorari. Among these considerations is whether there is a conflict between two courts of appeals," wrote Justice White, dissenting to a denial of a petition for a writ of certiorari in *Beaulieu v. United States*, 497 U.S. 1038, 1039 (1990). Justice White, who wrote almost regularly in dissent to such denials, added that "[j]ust this past Monday, we granted certiorari in two cases that, absent conflict between courts of appeals, very

likely would not have been granted. [cit.] This is a weekly occurrence, but it also regularly happens that certiorari is denied in other cases presenting the kind of conflicts singled out by Rule 10."

In *Beaulieu*, this Court declined to grant certiorari where the issue was whether a district judge can rely on testimony from the trial of a defendant's co-conspirators in sentencing that defendant. The Tenth Circuit had expressly rejected a position taken by the Eleventh Circuit on the topic. Voting 8-1, this Court elected not to take up the issue, with Justice White standing alone in dissent.

In stating the possible reasons for not taking certiorari, Justice White wrote that "[i]n some of these cases it is perhaps arguable that the alleged conflict was not 'real' or 'square'. In most cases, however, it is very difficult to deny the conflict, especially where, as in this case, the court of appeals expressly differs with another court, yet certiorari is denied because the conflict is 'tolerable' or 'narrow,' or because other courts of appeals should have the opportunity to weigh in on one side or another of the unsettled issue, or for some other unstated reason." *Id.*

Respondents would use the term "unripe" to describe the conflict in question in the present case. This Court set down the road map for consideration of Title II of the ADA as applied to various government-sponsored activities in *Tennessee v. Lane*, *supra*, in 2004. The various circuit courts of appeals have had less than one year as of this writing to utilize this road map on the various applications of Title II. Only the Eleventh and Third Circuits have actually analyzed the issue in the present case in any detail, in *Miller v. King, et al.*, 384 F.3d 1248 (11th Cir. 2004), and *Cochran v. Pinchak*, 401 F.3d 184 (3rd Cir. 2005). None of the circuits have

considered the issue *en banc*, although such a petition is now pending before the Eleventh Circuit in *Miller*. The Ninth Circuit had the opportunity to enter into the same type of post-*Lane* detailed analysis, but passed on it in *Phiffer v. Columbia River Correctional Institute*, 384 F.3d 791 (9th Cir. 2004) (cert. pending) ("*Our precedent* clearly commands the conclusion that the State is not entitled to Eleventh Amendment immunity under Title II. . . . "[emphasis added]). No other circuits have had the chance to address the issue in the post-*Lane* age. The issue has not fully ripened, and the Court would be justified in deciding to prefer to await further litigation which may produce a consensus or at least a satisfactory majority view on the application of Title II of the ADA to lawsuits by incarcerated convicts regarding the conditions of their confinement.

II. Contrary To The Arguments of the Petitioners, This Case Is a Poor Vehicle To Resolve the Existing Conflict.

Respondents view this case as the worst available vehicle for consideration of the application of Title II to prisoner cases. The Court of Appeals used only one sentence, citing another Eleventh Circuit case, to uphold the district court's judgment regarding the availability of monetary damages under Title II, did not publish the case, and sent the case back to the district court for the relief Goodman sought from it: a requirement that the lower court consider his claim for monetary damages and injunctive relief resulting from alleged violations of his Constitutional rights.

A. The present case is based entirely on another Eleventh Circuit case still in the pipeline, *Miller v. King, et al.*

The Eleventh Circuit fully analyzed the question of whether Congress properly abrogated the States' Eleventh amendment immunity for monetary damages claims in Title II of the ADA under §5 of the Fourteenth Amendment in *Miller v. King*, *supra*, and said "Title II of the ADA, as applied in the Eighth Amendment context to state prisons, fails to meet the requirement of proportionality and congruence." 384 F.3d, at 1275. It further said, in *Miller*, that "to uphold Title II's application to state prisons would allow Congress to 'rewrite' the Eighth Amendment law." *Id.* The Eleventh Circuit took eight pages in *Miller* to analyze the legal issues involved with Congress's abrogation of States' Eleventh Amendment immunity in Title II of the ADA. In the present case, the Court took one sentence to affirm the District Court's decision on the basis of the *Miller* holding.[4]

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[4] Petitioner United States admits in a footnote that its petition for rehearing and rehearing en banc remains pending in the *Miller* case in the Eleventh Circuit Court of Appeals. Said petitioner further admits *Miller* involved the same Eleventh amendment issue presented here, and then speculates that "whatever the ultimate disposition of the *Miller* petition, it will not affect that aspect of the court's holding pertaining to the scope of Congress's Section 5 power, which the Goodman panel applied here." Respondents submit this is nothing more than an attempt to have this Court consider the *Miller* decision through the present case, before *Miller* reaches this Court. Respondents urge this Court to resist such a temptation.

B. The Eleventh Circuit gave the inmate what he sought: a trip to the District Court with a chance at monetary relief.

Respondents also show the Court of Appeals remanded Petitioner Goodman's case for ADA injunctive relief as well as his Eighth Amendment claim for monetary damages. Petitioners' Appendix A, p. 22a. Therefore, if Petitioner Goodman's request for certiorari is not granted, Goodman has a remedy wherein he returns to the District Court for an opportunity to be heard and a chance at monetary relief for his alleged injuries.

C. This case is unpublished, thus minimizing its effect on other courts and the state of the law.

Finally, Respondents mention the unpublished nature of the case the Petitioners seek a writ for in this case. Eleventh Circuit Rule 36-2 clearly says "[u]npublished opinions are not considered binding precedent." 11th Cir. R. 36-2. Furthermore, in Internal Operating Procedure (I.O.P.)-7, the circuit court says it "generally does not cite to its 'unpublished' opinions because they are not binding precedent." *Id.* Other courts have similarly said unpublished opinions are not binding. *See, e.g. United States v. Madden*, 2005 U.S. App. LEXIS 5326 (6th Cir. 2005), *Sentry Prot. Prods. v. Eagle Mfg. Co.*, 400 F.3d 910 (Fed. Cir. 2005), and *Phiffer v. Columbia River Correctional Institute*, 2001 U.S. Dist. LEXIS 23734 (D. Ore. 2001). It is extremely unlikely any court would use the *Goodman* case from the Eleventh Circuit as precedent to hold Congress improperly abrogated the States' Eleventh Amendment immunity in Title II of the ADA as applied to prison conditions.

As this Court's calendar does not allow for the granting of certiorari except on important cases with ripe and "real" (according to Justice White) conflicts between the circuits, it strains imagination to see how this case could be the ideal vehicle for this Court to deal with the question of the application of Title II to prison inmates' claims for monetary damages on allegations regarding the conditions of their imprisonment. Because *Miller v. King*, *supra*, not the present case, is the Eleventh Circuit's chief case on the issue of Congress's abrogation of states' Eleventh Amendment immunity in Title II of the ADA, because the present case is unpublished, and therefore, unbinding, and because Mr. Goodman, if certiorari is not granted, will still be able to be heard on his claim to monetary damages under §1983, Respondents argue this case is not the proper vehicle for this Court to address the important question presented.

III. The Eleventh Circuit's analysis and decisions regarding the application of Title II to prisoners' Eighth Amendment claims are consistent with this Court's decision in *Lane*.

The conflict in this case concerns the lower courts' response to this Court's decision in *Tennessee v. Lane*, *supra*, as applied in the context of ADA Title II claims by incarcerated state prison inmates regarding the conditions of their confinement. Respondents contend the Eleventh Circuit has correctly followed *Lane* in its analysis of Title II of the ADA as to prison Eighth Amendment cases, and the application for a writ of certiorari should be denied. They further add that the Ninth Circuit, in *Phiffer*, where certiorari is also sought, did not follow *Lane*.

This court previously has stated that Congress may abrogate the states' Eleventh Amendment immunity. To determine whether Congress has done so, courts must ask: (1) whether Congress unequivocally expressed its intent to abrogate the states' immunity; and (2) if it did, whether Congress acted pursuant to a valid grant of constitutional authority. *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000). The second question is the only one relevant to cases concerning the propriety of Congress's abrogation of states' Eleventh Amendment immunity in Title II of the ADA.

In determining whether Congress has properly abrogated Constitutional immunity, the "congruence and proportionality" test must be applied. This test, developed by this Court in *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997), requires a court to (1) identify "with some precision the scope of the constitutional right at issue; (2) determine whether Congress identified a history and pattern of unconstitutional conduct by the States, and (3) if so, analyze whether the statute is an appropriate, congruent and proportional response to that history and pattern of unconstitutional treatment. *Miller v. King*, 384 F.3d, at 1269, citing *Board of Trustees v. Garrett*, 531 U.S. 356, 374 (2001).

Further focusing the analysis which needs to take place, this Court in *Tennessee v. Lane*, *supra*, said "[t]he only question that remains is whether Title II is an appropriate response to this history and pattern of unequal treatment." 124 S.Ct., at 1992. This Court then said "nothing in our case law requires us to consider Title II, with its wide variety of applications, as an undifferentiated whole." 124 S.Ct., at 1992. Therefore, it then examined Congress's abrogation as it "applies to the class of

cases implicating the accessibility of judicial services." *Id.* at 1993.

In other words, this Court set down a formula for analysis of Congress's abrogation of Eleventh Amendment immunity in Title II of the ADA: Ask the third question of the *Boerne* test on an as-applied basis regarding the type of Title II claim in question, such that the court should analyze whether the statute is an appropriate, congruent and proportional response to the history and pattern of unconstitutional treatment of people with disabilities as applied to the rights in question. In *Miller*, the Eleventh Circuit applied the formula to prison conditions for incarcerated convicts in state prisons. In the present case, as stated earlier, the Court simply cited *Miller* to throw out Goodman's ADA claim for monetary damages.

In the case on which the *Goodman* court relied in making its decision, *Miller v. King*, *supra*, the Eleventh Circuit gave proper deference to this analytical roadmap in coming to its conclusion regarding the propriety of Congress' abrogation of Eleventh Amendment immunity. With regard to the three-part test prescribed by this Court in *Boerne*, the Eleventh Circuit cited this Court's *Lane* decision as saying, with regard to the first part – identification of the scope of the constitutional right at issue – that "Title II seeks to enforce the Fourteenth Amendment's 'prohibition on irrational disability discrimination.'" 384 F.3d, at 1270. It added that this Court, in *Lane*, further said Title II "'seeks to enforce a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review,' including rights related to access to courts ... and the Confrontation Clause of the Sixth Amendment." *Id.*

In response to the second requirement – that it determine whether Congress identified a history and pattern of unconstitutional conduct by the States – the Eleventh Circuit further gave credence to this Court's decision in *Lane*, stating that "[t]he Supreme Court concluded that Title II of the ADA was enacted in response to a history and pattern of constitutional violations by the States, thereby satisfying *Boerne*'s step-two inquiry." *Id.* at 1270-71. Only on the third part of the *Boerne* test – whether the legislation at issue is a congruent, proportional response to the history of Constitutional violations found in the second part – does the Eleventh Circuit give itself room to engage in independent analysis of Title II of the ADA. *Id.* at 1271. In doing so, it further adhered to this Court's *Lane* decision by saying it requires that this third question must be answered on an as-applied basis to the application of Title II at issue, which, in both *Miller* and the present case, involves its application to convicted incarcerated prisoners' prison condition claims.

This deferential, but thorough, analysis contrasts sharply with the Ninth Circuit's decision in *Phiffer v. Columbia River Correctional Institute*, *supra* (cert. pending), where the Ninth Circuit found it unnecessary to engage in any detailed analysis of the specific rights involved in a Title II claim by a formerly incarcerated convict. Instead, the Ninth Circuit simply said binding circuit precedent issued before the *Lane* case required that it find, across the board, that "the State is not entitled to Eleventh Amendment immunity under Title II of the ADA." 384 F.3d, at 792, citing *Dare v. California*, 191 F.3d 1167 (9th Cir. 1999); *Clark v. California*, 123 F.3d 1267 (9th Cir. 1997). In a concurring opinion, Judge O'Scannlain warned that trouble may come from the

across-the-board opinion. "Because *Dare* and *Clark* upheld the entirety of Title II without engaging in the nuanced, case-by-case analysis demanded by *Lane*, their continued vitality is uncertain." *Id.* at 793. The Ninth Circuit's decision in *Pfiffer* will not be able to withstand whatever conclusion this Court makes with regard to the application of Title II of the ADA to Eighth Amendment claims by prison inmates. Even if the Court decides Congress properly abrogated the States' Eleventh Amendment immunity in devising the ADA as to prisoners' Title II claims, the Ninth Circuit will have to come into line with the main effect of this Court's *Lane* decision: that all courts analyzing the application of Title II of the ADA to all government scenarios must involve the three-step analysis set down in *Boerne* and *Lane*, with emphasis on the third question (whether Title II is an appropriate response to the history and pattern of unequal treatment found in response to the second question) on an as-applied basis.

For this reason, if this Court deems it necessary to consider a case regarding application of Title II of the ADA to prisoner claims, the decision of the Ninth Circuit in *Pfiffer*, where that Court ignored the analysis standard set down in *Lane*, should be taken over the present case or *Miller*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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In The

Supreme Court of the United States

TONY GOODMAN,

Petitioner

v.

STATE OF GEORGIA, *et al.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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Amend. XIV, § 5 ..... *passim*

Americans with Disabilities Act, Title II, 42 U.S.C. § 12131 *et seq.* ..... *passim*

Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 5

42 U.S.C. § 1983 7

REPLY BRIEF FOR PETITIONER

The need for this Court to resolve the clear conflict in the circuits has become even more compelling since the time the petitions for *certiorari* were filed in this case. The Third Circuit has now sided with the Eleventh Circuit against the Ninth Circuit. In *Cochran v. Pinchak*, 401 F.3d 184 (3d Cir. 2005), the Third Circuit held that Congress does not have the power to abrogate state sovereign immunity pursuant to Section 5 of the Fourteenth Amendment for suits brought under Title II of the Americans with Disabilities Act (ADA) by prisoners with disabilities against a state prison.

Respondents acknowledge that "there is a conflict between decisions of the Ninth Circuit and the Third and Eleventh Circuits" on the question presented. Br. in Opp. 6. They contend only that the conflict is not "ripe." But the conflict is significant and it is not going to disappear. Two circuits have now taken the position that the application of Title II of the ADA to cases brought by prisoners against state prisons exceeds Congress's Section 5 authority, while the Ninth Circuit stands firm in its position that Congress's power to abrogate under Section 5 extends to such applications. Unless this Court steps in to resolve it, the conflict will persist. Waiting for yet more circuits to weigh in on the question would serve no useful purpose. And contrary to respondents' contentions, this case presents an especially appropriate vehicle for resolving that important question.

A. This Case Presents A Direct And Widening Conflict In The Circuits

1. At the time the petitions for a writ of *certiorari* were filed by petitioner Goodman and the United States, a direct conflict existed in the circuits regarding the question presented. In *Phiffer v. Columbia River Correctional*

Institute, 384 F.3d 791 (9th Cir. 2004), *pet. for cert. filed*, No. 04-947 (Jan. 11, 2005), a case in which a prisoner challenged the State's refusal to accommodate his disability, the Ninth Circuit had held that Title II validly abrogated state sovereign immunity. By contrast, in this case and in *Miller v. King*, 384 F.3d 1248 (11th Cir. 2004), the Eleventh Circuit had held that Title II is *not* proper Section 5 legislation as applied to cases brought against a state prison. Both the Ninth and Eleventh Circuits ruled after this Court addressed the application of Section 5 abrogation analysis to Title II in *Tennessee v. Lane*, 124 S. Ct. 1978 (2004). And as respondents acknowledge, the Eleventh Circuit's position "contrasts sharply" with the Ninth Circuit's decision in *Phiffer*. Br. in Opp. 14.

The conflict has now widened. In *Cochran v. Pinchak*, 401 F.3d 184 (3d Cir. 2005), the Third Circuit agreed with the Eleventh Circuit's ruling and held that Title II, as applied to a suit brought by a blind prisoner, "does not validly abrogate the States' sovereign immunity and cannot be enforced against the State of New Jersey or the [Department of Corrections] in a lawsuit for monetary damages." *Id.* at 193. Chief Judge Scirica dissented from that ruling. *See id.* at 193-199.

2. Although respondents acknowledge the existence of the conflict in the circuits, they contend (Br. in Opp. 4-5, 6-8) that the issue is not "ripe" for review. But there is no reason to believe that the existing conflict will resolve itself. The Eleventh Circuit denied rehearing *en banc* in this case. Pet. App. 29a-30a. The Ninth Circuit likewise has made clear that it "decline[s] further review of [its] settled precedent" on this question. *Phiffer*, 384 F.3d at 793; *see also Hason v. Medical Bd. of Cal.*, 294 F.3d 1166, 1167 (9th Cir.) (O'Scannlain, J., dissenting from denial of rehearing *en banc*), *cert. granted*, 537 U.S. 1028 (2002), *cert. dismissed*, 538 U.S. 958 (2003).

Nor is there any reason to believe that further percolation will sharpen or clarify the issue presented. Indeed, each new case further underscores the disagreement in the circuits – not just on the basic issue of whether Title II validly abrogates state sovereign immunity in the prison context but also on the broader question of the proper level of generality for applying the "congruence and proportionality" test of *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

This conflict on the broader level-of-generality question was described in the petition for certiorari (Pet. 11-14), and respondents entirely failed to address it. The Eleventh Circuit applies a "context by context" approach in determining whether Title II validly abrogates sovereign immunity in particular circumstances. *Miller*, 384 F.3d at 1276 n.34; Pet. App. 19a. As a result, that court will not sustain Title II's abrogation of sovereign immunity as applied to any case involving prisons unless it can do so for every case involving prisons. The Eleventh Circuit recently followed the same "context by context" approach in *Association for Disabled Americans, Inc. v. Florida International University*, ___ F.3d ___, 2005 WL 768129 (11th Cir. Apr. 6, 2005). As noted in the petition (Pet. 11-14, 17-19), that approach by the Eleventh Circuit conflicts with a line of pre-*Lane* circuit court precedent and with *Lane* itself by holding that Title II cannot abrogate state sovereign immunity even in a case like this one, in which Title II would provide a remedy for an actual violation of the plaintiff's constitutional rights.

The Third Circuit's recent decision in *Cochran* appears to take matters to the opposite extreme. Where the Eleventh Circuit held that a prisoner cannot seek money

damages under Title II *even when* the State's actions violated his constitutional rights, the Third Circuit appeared to hold that a plaintiff cannot seek money damages under Title II *unless* the State's actions violated his constitutional rights. The *Cochran* court looked at each of the plaintiff's requested accommodations and concluded that their denial did "not rise to the level of a violation" of the Fourteenth Amendment. 401 F.3d at 192. Noting that "these cases are always fact-specific," *id.* at 193, the court concluded that "Title II's remedies are not congruent and proportional to the specific claims brought here." *Id.* at 191.

The Third Circuit's claim-specific mode of analysis stands in opposition to the Eleventh Circuit's "context by context" approach. *Miller*, 384 F.3d at 1276 n.34. And both approaches contrast with the Ninth Circuit's decision to "uph[o]ld the entirety of Title II." *Phiffer*, 384 F.3d at 793 (O'Scannlain, J., concurring). The widening disagreement among the circuits – on both the basic question whether Title II validly abrogates state sovereign immunity in the prison context and the broader question of the level of generality at which the *City of Boerne* "congruence and proportionality" analysis should be conducted – calls out for this Court's resolution.

B. This Case Is An Especially Appropriate Vehicle For Resolving The Conflict In The Circuits

1. This case is an especially appropriate vehicle for resolving the conflict in the circuits. The parties developed an extensive factual record, and the opinion of the court of appeals contains a substantial discussion of the constitutional violations implicated by the facts. Thus, this case comes to the Court in a posture that will permit informed

consideration of the as-applied approach to Section 5 analysis adopted in *Lane*. *See* Pet. 19-21.[1]

Respondents nonetheless assert (Br. in Opp. 15) that *Phiffer* presents a better vehicle for this Court's review. But in contrast to this case – which was resolved on a motion for summary judgment after the submission of affidavits and documentary evidence, Pet. App. 11a – *Phiffer* has received virtually no factual development. And as the United States pointed out in its petition for *certiorari* in the instant case, the Court would likely be unable to reach this constitutional question in *Phiffer*; Phiffer's claim under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, would afford him precisely the same relief as is available under Title II of the ADA. *See* Pet. for Cert., *United States v. Georgia*, No. 04-1203, at 17-19.

2. Respondents note (4-5, 8-11) that the Eleventh Circuit's opinion was unpublished and relied on the court's earlier *Miller* decision to resolve the Title II

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[1] Respondents attempt to cast doubt on petitioner's complaint by referring to the events underlying his criminal conviction—events that took place in 1995. Br. in Opp. 3 n.2. But petitioner's allegations are supported by prison medical records and sworn affidavits. *See* Pet. App. 11a; Dt. Ct. Dkt. 37 at 9 (magistrate judge recommending denial of respondents' motion for summary judgment because "a genuine issue of material fact" exists concerning petitioner's claim "that he was injured when he fell while transferring himself from his wheelchair to the toilet and when he was trying to move from his wheelchair to a seat in the shower stall"); Dt. Ct. Dkt. 31 at 2 (Respondents' Motion for Summary Judgment) (explaining that petitioner was assigned to his housing unit because of "the special requirements associated with him being wheel chair bound"). Even the opinion cited by respondents states that, viewing the evidence at the criminal trial in the light most favorable to the government, petitioner "needed help getting out of" his car and required someone else to open a door "so that [he] could wheel himself" into his house. *Goodman v. State*, 516 S.E.2d 824, 825 (Ga. App. 1999).

sovereign immunity question. But this Court has granted *certiorari* in numerous cases just like this one – where a court of appeals, in an unpublished opinion, relied on prior published circuit precedent that conflicted with rulings of other circuits. *See, e.g., Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Resources*, 532 U.S. 598, 602 (2001); *Carter v. United States*, 530 U.S. 255, 260 (2000); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 520-521 (1999); *Old Chief v. United States*, 519 U.S. 172, 177-178 (1997); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 20 (1993).[2] Indeed, in *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993), this Court granted *certiorari* in the case of an unpublished opinion "[b]ecause the court below declared a federal statute unconstitutional" under circumstances much like this case. *Id.* at 425. The court of appeals in *Edge* had "affirmed a judgment that an Act of Congress was unconstitutional as applied" using "reasoning that was questionable" under this Court's cases. *Id.* at 425 & n.3.

Respondents also observe (Br. in Opp. 8, 9 n.4) that a petition for rehearing *en banc* remains pending in *Miller*.

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[2] The Court also regularly grants *certiorari* in cases of unpublished decisions to resolve circuit conflicts without even noting the presence of any published precedent in that circuit. *See Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 430-431 (2001) (*certiorari* granted "to resolve confusion among the Courts of Appeals" in case where court of appeals' opinion was unpublished); *Eastern Associated Coal Corp. v. United Mine Workers*, 531 U.S. 57, 61 (2000) (*certiorari* granted "in light of disagreement among the Circuits" in case where court of appeals' opinion was unpublished); *Lynce v. Mathis*, 519 U.S. 433, 436 (1997) (*certiorari* granted to review court of appeals' unpublished order denying a certificate of probable cause where another circuit "reached a different conclusion on similar facts").

That fact is of much less significance here than it might be elsewhere, because the same three-judge panel of the Eleventh Circuit heard oral argument on the same day in both this case and in *Miller*. That panel issued its unpublished opinion in this case just two days after it issued its published opinion in *Miller*. Therefore, the denial of the petition for rehearing *en banc* in this case – at a time when the rehearing petition in *Miller* was pending – suggests that the court's resolution of the *Miller* petition will not affect the issues presented here and that any possible change to the disposition of *Miller* will relate to an issue that is not common to both cases. Indeed, the Eleventh Circuit continues to treat *Miller* as setting forth the law governing abrogation of state sovereign immunity under Title II. *See Association for Disabled Americans, Inc.*, ___ F.3d at ___, 2005 WL 768129, at *3 (relying on *Miller* to decide the validity of Title II's abrogation "as applied to access to public education").

In any event, even if the Eleventh Circuit were to grant rehearing in *Miller* and reverse its Section 5 holding, that would neither eliminate the circuit split (which would merely shift to two-to-one in the other direction) nor provide petitioner any relief (because the petition for rehearing *en banc* in his case has already been denied, Pet. App. 29a-30a). Unless this Court steps in to resolve the conflict in the circuits, that disagreement will persist and petitioner will be denied the full panoply of remedies Congress intended to confer upon him and other victims of discrimination.

3. Respondents also contend (Br. in Opp. 8, 10) that review is not warranted because the court of appeals gave petitioner "what he sought," by permitting him to proceed on his damages claim brought under 42 U.S.C. § 1983 for violation of his Eighth Amendment rights. But there are profound differences between the relief available to

petitioner under Section 1983 and the relief he seeks under Title II of the ADA. Petitioner can recover damages under Section 1983 only from the individual defendants, who may very well be judgment-proof. He cannot recover damages from the State, as he seeks to do in his Title II claim. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64-71 (1989); Pet. App. 15a. And because his Section 1983 claims can proceed against only the individual defendants in their personal capacities, those claims will be subject to a qualified immunity defense. *See Anderson v. Creighton*, 483 U.S. 635, 638 (1987). No such defense would apply to his Title II suit seeking damages from the State itself. *Cf. Owen v. City of Independence*, 445 U.S. 622, 652-656 (1980).

Respondents further assert (Br. in Opp. 10) that petitioner can continue to litigate his claims for prospective injunctive relief under Title II. But the court of appeals' holding regarding Congress's authority under the Fourteenth Amendment is not limited to actions for damages; it implicates actions for injunctive relief as well. Pet. App. 21a (dismissing ADA claim for injunctive relief against respondents Georgia and its agencies). If the Eleventh Circuit's Section 5 holding stands, the statute will provide no basis for *any* relief against a State in the prison context – damages *or* an injunction – unless it can be upheld under Congress's Article I commerce power in that context.

Significantly, respondents devoted more than six pages of their summary judgment brief in the district court to the contention that "the Commerce Clause does not authorize Congress to regulate state correctional facilities under the Americans with Disabilities Act." Dt. Ct. Dkt. 31 at 7 (capitalization altered). The district court did not rule on the Commerce Clause argument, and the Eleventh Circuit has made clear that the question remains

open. *See Miller*, 384 F.3d at 1268 n.23. Not having abandoned their contention that Title II exceeds Congress's Commerce Clause authority as applied to the prison context, respondents cannot credibly represent that Goodman – or any other prisoner in the Eleventh Circuit – will be entitled to injunctive relief should he prove a violation of his rights under that statute.

C. The Eleventh Circuit's Ruling Was In Error

Respondents make no sustained effort to defend the Eleventh Circuit's conclusion that Congress lacks Section 5 power to abrogate state sovereign immunity in Title II suits against state prisons. They assert only that the court of appeals "gave proper deference" to the "analytical roadmap" prescribed by this Court in *Lane*. Br. in Opp. 13. But as the petitions for *certiorari* filed by Goodman and the United States demonstrate, the Eleventh Circuit's ruling contravenes the holdings in *Lane* in two respects.

First, the court of appeals failed to appreciate that the prison context – like the access to courts context in *Lane* – implicates constitutional rights that impose "affirmative obligations" on the State, *Lane*, 124 S. Ct. at 1994, and otherwise demand "more searching judicial review," *id.* at 1988. *Compare* Pet. 14-17 (detailing affirmative obligations imposed by Eighth Amendment and other constitutional provisions), *with Miller*, 384 F.3d at 1274 (concluding that Eighth Amendment imposes only a "negative obligation" in the prison context). Relatedly, the Eleventh Circuit failed to give sufficient weight to the "substantial body of evidence of states' unconstitutional treatment of disabled prisoners" which "has persisted despite several legislative efforts to remedy the problem of disability discrimination." *Cochran*, 401 F.3d at 198 (Scirica, C.J., dissenting).

Second, the court erroneously held that Title II of the ADA could not validly abrogate state sovereign immunity in any prison case, even one in which the statute provides a remedy for an actual violation of the plaintiff's constitutional rights. *See* Pet. 17-19. Respondents make no effort to answer this point, but simply contend that the Eleventh Circuit in *Miller* engaged in an as-applied analysis while the Ninth Circuit in *Phiffer* did not. Br. in Opp. 11-15. That contention, of course, only underscores the conflict in the circuits that calls out for this Court's resolution.

CONCLUSION

For the reasons set forth above and in the petition for a writ of *certiorari*, and in the petition in *United States v. Georgia*, No. 04-1203, the petition should be granted.

Respectfully submitted,

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April 25, 2005

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Nos. 04-1203 and 04-1236

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF GEORGIA, ET AL.

TONY GOODMAN, PETITIONER

v.

STATE OF GEORGIA, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX

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PETITIONS FOR WRITS OF CERTIORARI FILED: MAR. 9, 2005
CERTIORARI GRANTED: MAY 16, 2005

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Plaintiff's declaration in support of his opposition to defendant's motion for summary judgment (filed Nov. 1, 2001) [Exh. L-4] 107

NOTICE

The following documents have been omitted in the printing of this Joint Appendix. They may be found in the Appendix to the United States' petition for a writ of certiorari, No. 04-1203, at the following pages:

Opinion of court of appeals for the Eleventh Circuit (filed Sept. 16, 2004) 1a-22a

District court order granting defendant's motion for summary judgment (filed Dec. 20, 2001) 23a-27a

District court judgment dismissing action (filed Dec. 20, 2001) 28a

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UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 02-10168-GG

TONY GOODMAN, PLAINTIFF-APPELLANT

v.

O.T. RAY, ET AL., DEFENDANTS

DOCKET ENTRIES

DATE	PROCEEDINGS
1/16/2002	Probable Jurisdiction Noted: Appellant-Goodman, Tony (Pro Se)
	* * * * *
3/18/2002	Appellant's Motion for Leave to Proceed is GRANTED. Appellant's Motion for Appointment of Counsel is GRANTED. Appellant's Motion for Transcripts at Govt. Expense is DENIED WITHOUT PREJUDICE to such motion being made by Appointed Counsel. (SFB)
	* * * * *
5/31/2002	ENTRY OF DISMISSAL: Pursuant to the provisions of 11th Cir. R. 42, this appeal is hereby dismissed for want of prosecution because the appellant has failed to file the record excerpts

DATE	PROCEEDINGS
	within the time fixed by the rules, effective this date.
	* * * * *
5/28/2002	Appellant's Brief Filed: Appellant-Goodman, Tony A. (Atty: Lawrence J. Bracken, II)
	* * * * *
6/11/2002	Motion to Reinstate Appeal: Appellant-Goodman, Tony A. (Atty: Lawrence J. Bracken, II)
	* * * * *
7/1/2002	Appellant's motion to reinstate this is appeal is GRANTED. GBT/SFB/j
	* * * * *
7/1/2002	Record Excerpts
8/01/2002	Appellees Brief Filed: Appellees-State of Georgia (Atty: David E. Langford)
	* * * * *
9/11/2002	Reply Brief Filed: Appellant-Goodman, Tony A. (Atty: Lawrence J. Bracken, II)
	* * * * *
11/13/2002	Oral Argument Scheduled: 11/13/02

DATE	PROCEEDINGS
11/15/2002	W. Christopher Arbery argued for Appellant, David E. Langford argued for Appellee
	* * * * *
5/14/2003	Amicus Curiae Brief: (Atty: Sarah E. Harrington)
	* * * * *
6/27/2003	The motion of Appellees to file a reply brief to Appellant's response brief, is GRANTED. (EEC)
	* * * * *
6/27/2003	Reply Brief to Appellant's Response Brief to Amici Curiae: (Atty: David E .Langford)
	* * * * *
7/03/2003	Letter issued to the parties in this appeal and in 02-10360 advising that the Court will withhold decision in these two cases until the USSC issues its decision in Lane (SC #02-1667)
	* * * * *
6/07/2004	The motion for supplemental briefing, filed by amicus curiae USA, is GRANTED. The parties and the United States are directed to file supplemental briefs of no more than thirty

DATE	PROCEEDINGS
	(30) pages. . . . by June 25, 2004. (see file for complete text) EEC
	* * * * *
6/25/2004	Supplemental Appellate Brief: (Atty: Lawrence J. Bracken, II)
6/28/2004	E-Brief Tendered: Intervenor by Sarah E. Harrington for United States of America
6/28/2004	Supplemental Appellee Brief:m 6/30 pt'd color (Atty: David E. Langford)
6/28/2004	Supplemental Amicus Brief: (Atty: Sarah E. Harrington)
7/01/2004	Notice of Intervention filed by United States
	* * * * *
7/9/2004	Appeal, No. 02-13348, scheduled for oral argument on July 20, 2004, raises issues similar, if not identical . . . this appeal is hereby TRANSFERRED and this Court ORDERS that this appeal be scheduled for re-argument on 7/20/04 . . . EEC/JCH/FARRIS/SEE TEXT
	* * * * *
7/20/2004	Oral Argument Scheduled: 07/20/04

DATE	PROCEEDINGS
7/23/200[illegible]	Sarah E. Harrington argued for Intervenor; W. Christopher Arbery argued for Appellant; David E. Langford argued for Appellee
	* * * * *
9/16/2004	Judgment Entered
9/16/2004	OPIN1 (Notice of issuance of opinion) issued. c: Arbery, W. Christopher; c: Bracken, Lawrence J., II; c: Charouhis, William Nicholas; c; Colombo, Sherril M.; c: Graham, James E.; c: Harrington, Sarah E.; c:Langford, David E.
9/16/2004	Opinion Issued - VACATED, REVERSED, and REMANDED, in part; AFFIRMED, in part.
	* * * * *
10/15/2004	Mandate Issued
	* * * * *
10/19/2004	Mandate Recalled
11/1/2004	Petition for Rehearing En Banc: (Atty: Sarah E. Harrington)

DATE	PROCEEDINGS
12/09/2004	The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, the Petition(s) for Rehearing En Banc are DENIED.
12/20/2004	CASE CLOSED-Mandate Issued
	* * * * *
3/14/2005	Notice of Filing Certiorari: sc# 04-1203
	* * * * *
5/23/2005	Certiorari Granted: sc# 04-1203
5/23/2005	Certiorari Granted: sc# 04-1236
5/23/2005	SC consolidated 04-1203 & 04-1236. Oral argument not yet scheduled.

UNITED STATES DISTRICT COURT
DISTRICT OF GEORGIA (STATESBORO)

Civil Docket No. 6:99-cv-00012-JEG

TONY GOODMAN, PLAINTIFF

v.

O.T. RAY, ET AL., DEFENDANTS

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
01/06/1999	1	ORDER granting leave to Proceed in Forma Pauperis, subject to PLRA; pla required to furnish Prisoner Trust Acct Stmt and Consent to Collection of Fees w/in 30 days, setting Notice of Compliance deadline to 02/12/99. (signed by Magistrate Judge James E. Graham); copies served. (ddc) (Entered: 01/06/1999)
01/06/1999	2	COMPLAINT (Filed Nunc Pro Time 01/04/99) (ddc) (Entered: 01/06/1999)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
05/17/1999	5	MOTION by Tony Goodman for Temporary Restraining Order and/or for Preliminary Injunction with brief in support. (ddc) (Entered: 05/17/1999)
		* * * * *
06/07/1999	8	MOTION by Tony Goodman for Temporary Restraining Order, for Protective Order with brief in support. (dks) (Entered: 06/11/1999)
		* * * * *
06/15/1999	11	REPORT AND RECOMMENDATIONS of Magistrate Judge James E. Graham recommending pla's claims ag/defs Ray, Garner, Thomas, Sikes, Brady, Patterson, Whimbly and King be dismissed; pla's civil rights claims ag/Georgia Dept of Corrections should also be dismissed. Objections to R and R due by 7/6/99 (ddc) (Entered: 06/15/1999)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
6/15/1999	13	REPORT AND RECOMMENDATIONS for Magistrate Judge James E. Graham Re: [8-1] motion for Temporary Restraining Order, [8-2] motion for Protective Order recommending motion be denied; Motion no longer referred; copies served. Objections to R and R due by 7/6/99 (ddc) (Entered: 06/15/1999)
		* * * * *
08/16/1999	19	ANSWER to Complaint by State of Georgia and GA Dept of Corr (Attorney Stephen E. Curry),; jury demand (ssl) Modified on 07/13/2001 (Entered: 08/17/1999)
08/20/1999	20	ORDER adopting [11-1] report and recommendations, dismissing pla claims against dft's Ray, Garner, Thomas, Sikes, Brady, Patterson, Whimbly, King and Ga. Dept. of Corrections, the only remaining claims is pla allegations of violations of the Americans With Disabilities Act. (signed by Judge B. Avant

DATE	DOCKET NUMBER	PROCEEDINGS
		Edenfield); [EOD Date 8/20/99 copies served. (jgb) (Entered: 08/20/1999)
08/20/1999	21	JUDGMENT adopting R/R and dismissing pla claims against Ray, Garner, Thomas, Sikes, Brady, Patterson, Whimby, King and Ga Dept of Corrections; [EOD Date 8/20/99 copies served. PLRA Notice mailed. (jgb) (Entered: 08/20/1999)
08/20/1999	22	ORDER denying [8-1] motion for Temporary Restraining Order, [8-2] motion for Preliminary Injunction, denying [6-1] motion to Amend [5-1] motion for Temporary Restraining Order by Tony Goodman, denying [5-2] motion for Preliminary Injunction by Tony Goodman, denying [5-1] for Temporary Restraining Order (signed by Judge B. Avant Edenfield); [EOD Date 8/20/99 copies served. ss/ Modified on 09/29/1999 (Entered: 08/20/1999)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
10/21/1999	25	MOTION by Tony Goodman for Summary Judgment with brief in support. (slt) (Entered: 10/21/1999)
		* * * * *
11/18/1999	32	STATEMENT OF MATERIAL FACTS by defendant O.T. Ray, defendant J. Wayne Garner, defendant A. G. Thomas, defendant Johnny Sikes, defendant J. Brady, defendant Margaret Patterson in support of [28-1] motion for Summary Judgment by State of Georgia (dks) (Entered: 11/23/1999)
12/02/1999	33	RESPONSE by Tony Goodman [28-1] motion for Summary Judgment by State of Georgia (slt) (Entered: 12/02/1999)
		* * * * *
02/10/2000	37	REPORT AND RECOMMENDATIONS of Magistrate Judge James E. Graham Re: [28-1] motion for Summary Judgment, [25-1] motion for Summary Judgment recommending that both motions be denied; copies served. Objections to R and R

DATE	DOCKET NUMBER	PROCEEDINGS
		due by 2/28/00 (ddc) (Entered: 02/10/2000)
		* * * * *
02/14/2000	39	MOTION by Tony Goodman to require Georgia State Prison to comply with Americans with Disabilities Act with brief in support. (Titled "Motion for Assistance and Change of Address of Plaintiff.") (slt) (Entered: 02/14/2000)
		* * * * *
02/25/2000	41	MOTION by Tony Goodman for emergency injunctive relif with brief in support. (slt) (Entered: 02/25/2000)
		* * * * *
02/25/2000	42	AFFIDAVIT by Tony Goodman Re: [41-1] motion for emergency injunctive relief by Tony Goodman (slt) (Entered: 02/25/2000)
03/06/2000	43	ORDER denying [28-1] motion for Summary Judgment, denying [25-1] motion for Summary Judgment (signed by Judge B. Avant Edenfield); [EOD Date 3/6/00 copies served. (ssl) (Entered: 03/06/2000)

DATE	DOCKET NUMBER	PROCEEDINGS
03/14/2000	44	ORDER denying [41-1] motion for emergency injunctive relief, denying [39-1] motion to require Georgia State Prison to comply with Americans with Disabilities Act (signed by Judge B. Avant Edenfield); [EOD Date 3/14/00 copies served. (ssl) (Entered: 03/14/2000)
		* * * * *
04/06/2000	46	DEMAND for jury trial by Tony Goodman (dks) (Entered: 04/07/2000)
		* * * * *
6/14/2001	62	ORDER granting consent to trial by Magistrate (signed by Judge B. Avant Edenfield); [EOD Date 6/14/01] copies served. (bcw) (Entered: 6/14/2001)
		* * * * *
10/22/2001	88	MOTION by State of Georgia for Summary Judgment with brief in support. (wwl) (Entered: 10/22/2001)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
10/22/2001	90	MEMORANDUM by State of Georgia in support of [88-1] motion for Summary Judgment by State of Georgia (wwl) (Entered: 10/22/2001)
11/01/2001	91	RESPONSE by Tony Goodman to [88-1] motion for Summary Judgment by State of Georgia (slt) (Entered: 11/01/2001)
		* * * * *
12/20/2001	94	ORDER granting [88-1] motion for Summary Judgment. Plaintiff's claim for injunctive relief has been rendered moot by his transfer from Georgia State Prison (signed by Magistrate Judge James E. Graham); [EOD Date 12/20/01] copies served. (nys) (Entered: 12/20/2001)
12/20/2001	95	JUDGMENT entered DISMISSING this action in accordance with the Court's Order of 12/20/01 granting Defendant's motion for summary judgment; [EOD Date 12/20/01] copies served. PLRA Notice mailed. (nys) (Entered: 12/20/2001)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
01/07/2002	96	NOTICE OF APPEAL by Tony Goodman; copies served. [95-1] judgment order, [94-1] order (jsr) (Entered: 01/07/2002)
		* * * * *
01/09/2002		USCA Case Number Re: [96-1] appeal by Tony Goodman USCA NUMBER: 02-10168G (kts) (Entered: 01/15/2002)
		* * * * *
10/18/2004	114	JUDGMENT OF USCA VACATING, REVERSING, and REMANDING, in part AFFIRMED, in part (certified copy) Re: [96-1] appeal by Tony Goodman (USCA recalled the mandate and directed the Clerk of district court to return the opinion and judgment issued as mandate due to a clerical error.) (nys) Modified on 10/25/2004 (Entered: 10/19/2004)
		* * * * *
12/22/2004	118	JUDGMENT OF USCA (certified copy) Re: [96-1] appeal by Tony Goodman Vacated, Reversed and Remanded in part and Affirmed in part. (bcw) (Entered: 12/27/2004)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
12/27/2004	120	Case reopened (bcw) (Entered: 12/27/2004)
		* * * * *

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF GEORGIA
STATESBORO DIVISION

Civil Docket No. CV-699-012

TONY GOODMAN, PLAINTIFF

v.

THE STATE OF GEORGIA AND
THE GEORGIA DEPARTMENT OF CORRECTIONS,
DEFENDANT

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

(Filed: Feb. 10, 2000)

Plaintiff, who is currently incarcerated at Macon State Prison in Oglethorpe, Georgia, filed this action alleging that Defendants violated his rights under the Americans With Disabilities Act, 42 U.S.C. § 12101, while he was an inmate at Georgia State Prison (GSP) in Reidsville, Georgia. Plaintiff filed a Motion for Summary Judgment with a brief in support. Defendants filed a Response and a Cross-Motion for Summary Judgment.

STATEMENT OF FACTS

Plaintiff claims that the State of Georgia and the Georgia Department of Corrections violated the Americans With Disabilities Act (ADA) by not providing him with reasonable accommodations regarding his disability and confinement to a wheelchair. (Pl.'s Compl., ¶ 1-3.) Plaintiff states that he has been confined to a wheelchair since 1992 because of a back injury suffered in a car accident. (Pl.'s Aff. Supp. Mot. Summ. J., Ex.

E.) Plaintiff complains that he was transferred from a medical prison that was equipped to deal with this disability to GSP, and while incarcerated there, Defendants allegedly failed to provide him with integrated services. (Pl's Compl., ¶¶ 3,6.) Plaintiff asserts that he was confined to administrative segregation at GSP and was denied accessibility to programs and services offered to similarly situated inmates. (Statement of Undisputed Facts in Supp. of Pl..'s Mot. Summ. J., ¶¶ 4, 14.) Plaintiff complains that the cell he was confined to lacked facilities for the disabled "for hygiene, drinking, and performing body excretion functions." (*Id.* at ¶ 22.) Also, Plaintiff points out a lack of wheelchair accessibility to the prison law library, church, and gymnasium. (Pl.'s Aff. Supp. Mot. Summ. J.; Miller Aff., Ex. P-11; Newsome Aff., Ex. P-12.) Plaintiff asserts that bathrooms, shower stalls, sinks, and entrances to buildings at GSP are not wheelchair accessible. As a result, Plaintiff allegedly lacked access to services and activities offered by GSP including counseling, education, vocational training, and recreation. (Statement of Undisputed Facts Pl.'s Mot. Summ. J., ¶¶ 14, 15.)

Additionally, Plaintiff claims that he requested, but did not receive, assistance from correctional officers in moving from his wheelchair to the toilet, shower and bed. (Decl. Support Pl.'s Opp'n. To Defs.' Mot. Summ. J., ¶ 15.) Plaintiff states that this lack of assistance caused him to have to sit in his own waste, to sleep in his wheelchair for long periods of time and to injure himself. In particular, Plaintiff states that he was injured when "hurling" himself from the toilet to his wheelchair on August 26, 1998. Plaintiff said that he also hurt himself on April 8, 1998 when he fell from a seat in the shower stall that was not designed for

handicapped individuals. (*Id.* at ¶¶ 16, 18; Pl.'s Compl. ¶¶ 36, 37.) Since filing his complaint, Plaintiff has been transferred from GSP to Lee Arrendale State Prison. He is now incarcerated at Macon State Prison, where he claims his disability is still not being reasonably accommodated by Defendants. Plaintiff is requesting injunctive and declaratory relief. In addition, Plaintiff seeks $600,000 in compensatory damages for mental suffering and $600,000 in punitive damages.

In their response, Defendants state that Plaintiff was assigned to segregated housing while at GSP because of his "disruptive conduct" and because of the "special requirements associated with his being wheelchair bound." (Defs.' Mot. Summ. J.) Defendants contend that Plaintiff is not a person subject to the Americans With Disabilities Act (ADA). Defendants also contend that the ADA cannot be applied to state prisons. (*Id.*) Finally, Defendants assert that Plaintiff's grievances concerning the alleged lack of reasonable accommodation of his disability were not substantiated when investigated by prison medical personnel. (Canady Aff., Ex. A.)

STANDARD OF DET MINATION

Summary judgment should be granted only if "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The procedure for disposing of a summary judgment motion is well-established. The Court may grant summary judgment to a party when after a reasonable time for discovery, the evidence demonstrates that the non-movant has failed to establish an essential element of his case. The party moving for summary judgment bears the initial burden of meeting this exacting standard. *Adickes v. S.H.*

Kress & Co., 398 U.S. 144, 157, 90 S. Ct. 1598, 1608, 26 L. Ed. 2d 142 (1970). In applying this standard, the *Adickes* Court explained that a court should view the evidence and all factual inferences in the light most favorable to the party opposing the motion. All reasonable doubts regarding the facts should be resolved in favor of the non-movant. *Adickes*, 398 U.S. at 157, 90 S. Ct. at 1608.

Once the moving party has met this initial burden, the burden shifts to the opposing party to show that a genuine issue of material fact exists. *Celotex Corp. v. Catrell*, 477 U.S. 317, 324, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986). The opposing party may not simply rest upon mere allegations or denials of the pleadings. Rather, the nonmoving party must make a sufficient showing of facts to establish the existence of an essential element to his case on which he will bear the burden of proof at trial. *Id.*; *Barfield v. Brierton*, 883 F.2d 923, 933 (11th Cir. 1989). To oppose the motion sufficiently after the movant has met his initial burden, the nonmoving party must point to evidence in the record or present additional evidence in the form of affidavits or as otherwise provided in Rule 56 of the Federal Rules of Civil Procedure. *Riley v. Newton*, 94 F.3d 632, 639 (11th Cir. 1996). If the record presents factual issues, the Court must deny the motion and proceed to trial. *Environmental Defense Fund v. Marsh*, 651 F.2d 983, 991 (5th Cir. Unit A 1981).[1] Summary judgment is also inappropriate where the parties agree on the basic facts, but disagree about the inferences that should be

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[1] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

drawn from these facts. *Lighting Fixture & Elec. Supply Co. v. Continental Ins. Co.*, 420 F.2d 1211, 1213 (5th Cir. 1969).

DISCUSSION AND CITATION OF AUTHORITY

Plaintiff claims that GSP does not provide reasonable accommodation of his needs as a handicapped individual and that he was denied access to programs and services because he is disabled, a violation of the ADA. Defendants present several responses. First, Defendants claim that they are immune from suit under the Eleventh Amendment because the ADA is not a valid exercise of the Enforcement Clause of the Fourteenth Amendment. Secondly, Defendants claim that Plaintiff is not a person subject to the ADA. Additionally, Defendants contend that Plaintiff's claim is foreclosed by the Prison Litigation Reform Act. Finally, Defendants claim that Plaintiff is not entitled to injunctive relief because the relief he seeks, transfer to a medical prison, has been obtained and the issue is moot. The court will deal with each argument in turn.

I. ***States Are Not Immune to Suits Brought Under the ADA; However, There Is an Issue of Fact as to Whether Defendants Reasonably Accommodated Plaintiff's Disability***

"It has long been recognized that each state is a sovereign entity in our federal system and is not amendable to suit by an individual without its consent." *Garrett v. University of Ala. at Birmingham Bd. of Trustees*, 193 F.3d 1214, 1218 (11th Cir. 1999). *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54, 116 S. Ct. 1114, 1122, 134 L. Ed. 2d 252 (1996). However, Congress can pass laws giving citizens the right to a cause of action in federal court against an unconsenting state when it has "unequivocally expressed its intent to abro-

gate the immunity," and when it has acted "pursuant to a valid exercise of power." *Seminole*, 517 U.S. at 55, 116 S. Ct. at 1123.

The ADA includes a clear statement of intent to abrogate Eleventh Amendment immunity: "A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of (the ADA)." *Garrett*, 193 F.3d at 1218 (quoting 42 U.S.C. § 12202). In addition to Congress's expressed intent to abrogate immunity, the Eleventh Circuit Court of Appeals has held that Congress's adoption of the ADA was a valid exercise of power under the Enforcement Clause of the Fourteenth Amendment, *Kimel v. State Bd. of Regents*, 139 F.3d 1426, 1433 (11th Cir. 1998), *rev'd on other grounds*, __ U.S. __, 119 S. Ct 901, 902, 142 L. Ed. 2d 901; *See also Garrett*, 193 F.3d at 1218.

Defendants cannot claim Eleventh Amendment immunity from suit by Plaintiff because this circuit has held that the language of the ADA expresses Congress's intent to abrogate immunity and the Act can be enforced against the states under the Fourteenth Amendment. However, there is an issue of fact as to whether Defendants have reasonably accommodated Plaintiff's disability. Plaintiff states that Defendants discriminated against him by assigning him to a cell and prison that do not comply with the ADA. Plaintiff states that his cell at GSP was too small to accommodate his wheelchair. Plaintiff claims that correctional officers would not assist him in moving from his wheelchair to the toilet, bed, and shower. As a result, Plaintiff claims that he fell and injured himself. Specifically, Plaintiff states that he injured himself when he fell

while "hurling" himself from the toilet to his wheelchair. Plaintiff states that he also injured himself when he fell from a shower stall seat that was not designed to accommodate disabled people. Furthermore, Plaintiff assets that he was segregated and denied access to the law library, church, gym and other services and activities because he is wheelchair bound.

Defendants claim that Plaintiff was segregated because of his "disruptive conduct" and because of the "special requirements associated with his being wheelchair bound." In addition, Defendants claim that the medical personnel at GSP investigated Plaintiff's grievances relating to his accommodations and found that "no harm" occurred to Plaintiff.

II. *There Is an Issue of Facts as to Whether Plaintiff's a "Qualified Individual" Under the ADA.*

Defendants claim that Plaintiff is not a "qualified individual" under the ADA. The ADA confers rights on "qualified individuals with a disability" who are excluded from participation in or the benefits of "services, programs, or activities" provided by a public entity. 42 U.S.C. § 12132 (1990). A "qualified individual" is a person who "meets the eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2)(1990). "The statute defines the term to include anyone with a disability." *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, _____, 118 S. Ct. 1952, 1955, 141 L. Ed. 2d 215 (1998). Plaintiff states he is disabled, the result of a spinal injury sustained in a car wreck. Plaintiff has presented evidence he is a "qualified individual" under the ADA.

III. ***There Is an Issue of Fact as to Whether Plaintiff's Claim for Mental Suffering Is Foreclosed by The Prison Litigation Reform Act.***

Defendants contend that Plaintiff cannot bring a lawsuit under section 1997e(e) of the Prison Litigation Reform Act without showing a serious injury. Defendants rely on the Court's decision in *Harris v. Garner*, 190 F.3d 1279 (11th Cir. 1999) *rehearing en banc* 197 F.3d 1059 (11th Cir. 1999), which has been vacated. The physical injury requirement does not apply to Plaintiff's claims for injunctive or declaratory relief. *Harper v. Showers*, 174 F.3d 716, 719 (5th Cir. 1999). However, the Prison Litigation Reform Act requires a physical injury before a Plaintiff can recover compensatory damages for mental suffering. *Id.* (quoting section 1997e(e)), which states: "No federal civil action may be brought by a prisoner . . . for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. § 1997e(e). The physical injury required by § 1997e(e) "must be more than de minimus, but need not be significant." *Id.* (quoting *Siglar v. Hightower*, 112 F.3d 191, 193 (5th Cir. 1997)). In his complaint, Plaintiff claims that he was injured when he fell while transferring himself from his wheelchair to the toilet and when he was trying to move from his wheelchair to a seat in the shower stall. Defendants deny Plaintiff incurred a serious injury. This creates a genuine issue of material fact.

IV. ***Plaintiff's Demand for Injunctive Relief Is Not Moot***

Defendants claim that Plaintiff is not entitled to injunctive relief because he has been transferred from GSP to Macon State Prison and the issue is moot. "It is well settled that at the time a plaintiff brings his suit, he must have standing to prosecute his claim: he must

have a 'personal stake' in the outcome of the litigation. *Tucker v. Phyfer*, 819 F.2d 1030, 1033 (11th Cir. 1987). Plaintiff requested a transfer from GSP to a medical prison that could meet his needs as a disabled individual. Plaintiff claims that Macon State Prison, which is within the Georgia Prison System is not a medical prison. Plaintiff also states that he is suffering from the same lack of accessibility at Macon State Prison as he did while incarcerated at GSP; therefore, his claim for injunctive relief is not moot.

CONCLUSION

There are genuine issues of material fact concerning the following: (1) whether Plaintiff's disability has been reasonably accommodated by Defendants; (2) whether Plaintiff is a "qualified individual" under the ADA; and (3) whether Plaintiff's injury was serious enough to recover damages for mental suffering. Accordingly, it is my **RECOMMENDATION** that Plaintiff's Motion for Summary Judgment be **DENIED** and the Defendants' Motion for Summary Judgment be **DENIED**.

SO **REPORTED AND RECOMMENDED**, this 10th day of Feb. 2000.

/s/ JAMES E. GRAHAM
JAMES E. GRAHAM
UNITED STATES
MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF GEORGIA
STATESBORO DIVISION

[Caption omitted in printing]

ORDER

(Filed: Mar. 6, 2000)

After a careful review of the file, the Court concurs with the Magistrate Judge's Report and Recommendation, to which objections have been filed. Accordingly, the Report and Recommendation of the Magistrate Judge is adopted as the opinion of the Court.

The Motions for Summary Judgment filed by Plaintiff and Defendants are DENIED.

SO ORDERED, this 6th day of Mar., 2000.

/s/ B. AVANT EDENFIELD
B. AVANT EDENFIELD, JUDGE
United States District Court
Southern District of Georgia

FORM TO BE USED BY PRISONERS IN FILING A COMPLAINT UNDER THE CIVIL RIGHTS ACT, 42 U.S.C. § 1983 IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA

(Filed: Jan. 6, 1999, *nunc pro tunc* Jan. 4, 1999)

Tony Goodman

(Enter above full name of plaintiff or plaintiffs)

v.

O.T. Ray, J. Wayne Garner, A.G. Thomas, Johnny Sikes, J. Brady, Margaret Patterson, Whimbly, R King, State of Ga., Ga. Dept. of Corrections

(Enter above full name of defendant or defendants)

I. Previous lawsuits

A. Have you begun other lawsuits in state or federal court dealing with the same facts involved in this action? Yes ____ No ____

If your answer to A is yes, describe each lawsuit in the space below. (If there is more than one lawsuit, describe the additional lawsuits on another piece of paper, using, the same outline.)

1. Parties to the previous lawsuit:

Plaintiffs: _____

Defendants: _____

_____

2. Court (if federal court, name the district; if state court, name the country):

   _____

3. Docket number: _____

4. Name of judge assigned to case: _____

5. Disposition
   (for example, was the case dismissed? appealed? is it still pending?): _____

   _____

6. Approximate date of filing lawsuit: ____

7. Approximate date of disposition: _____

8. Were you allowed to proceed in *forma pauperi* (without prepayment of fees)?
   Yes ____No____

B. While incarcerated or detained in any facility, have you brought any lawsuits in federal court which deal with facts other than those involved in this action? Yes ____No ____

   If your answer to B is yes, describe each lawsuit in the space below. (If there is more than one lawsuit, describe the additional lawsuits on another piece of paper, using the same outline.)

1. Parties to previous lawsuit:

   Plaintiffs: _____

   Defendants: _____

2. Court (name the district): _____

   _____

3. Docket number: _____

4. Name of judge assigned to case: _____

5. Disposition
(for example, was the case dismissed? appealed? is it still pending?):

_____

6. Approximate date of filing lawsuit: ____

7. Approximate date of disposition _____

8. Were you allowed to proceed in *forma pauperis* (without prepayment of fees)?
Yes ____ No____

C. As to any lawsuit filed in federal court where you were allowed to proceed *in forma pauperis*, was any suit dismissed on the ground that it was frivolous, malicious, or failed to state a claim? Yes ___ No ___

1. If your answer to C is yes, name the court and docket number for each case:

_____ _____
_____ _____
_____ _____
_____ _____

II. Place of present confinement: G.S.P.

A. Is there a prisoner grievance procedure in this institution? Yes ✪ No ___

B. Did you present the facts relating to your complaint to the appropriate grievance committee: Yes ✪ No ___

C. If your answer to B is yes:

1. What steps did you take? Please see grievances #517-97-2290, 517-97-0297, 517-96-8080, 517-97-1623, 517-98-1762, 517-96-1080, 517-98-0766, 517-98-2347, 517-98-2128, 517-98-0417, 517-98-0466, 517-98-1157, 517-98-1678, 517-98-1083, 517-97-1551, 517-97-0235, 517-97-2431, 517-97-0234, 517-97-1036, 517-97-1422, 517-97-1030, 517-97-2289, 517-98-0819, 517-96-2191 See Page 9-A, for the other grievances #.

2. What was the result: DENIED

3. Did you appeal any adverse decision to the highest level possible in the administrative procedure? Yes X No

   If yes, what was the result: DENIED

D. If you did not utilize the prison grievance procedure, explain why not: _____

IV. Parties

(In Item A below, list your name as plaintiff and current address. Provide the name and address of any additional plaintiffs on an attached sheet).

A. Name of plaintiff: Tony Goodman
Address: G.S.P.
100 GA. Hwy. 147
Reidsville, GA. 30499-9701

(In Item B below, list the defendant's full name, position, place of employment, and current address. Provide the same information for any additional defendants in Item C below.)

B. Name of defendant: Johnny Sikes - ET. AL.
Position: Warden
Place of employment: G.S.P. See Page #18
Current Address: 100 GA. Hwy. 147
Reidsville, GA. 30499-9701

C. Additional defendants: _____

_____

_____

_____

_____

V. Statement of Claim

State here as briefly as possible the FACTS in your case. Describe how each defendant is personally involved in the depriving you of your rights. You must include relevant times, dates, places, and names of witnesses. DO NOT GIVE LEGAL ARGUMENTS OR CITE ANY CASES OR STATUTES. If you intend to allege a number of related claims, number and set forth each claim in a separate paragraph. (Use as much space as you need. Attach extra sheets if necessary.)

Please see Pages 1-18 - Attachments

VI. Relief

State briefly exactly what you want the court to do for you. Make no legal argument. Cite no cases or statutes.

Please See Pages 1-18

I declare under penalty of perjury that the foregoing is true and correct.

Signed this 28th day of Dec. 1998

Prisoner No. 276619 /s/_____
(Signature of Plaintiff)

1. Plaintiff Tony Goodman, a black male, brought this race discrimination action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, - 2000e 17. The Equal protection clause of the Fourteenth Amendment to the United States constitution, as enforced by 42 U.S.C. § 1983. The due process clause, deliberate indifference and reckless disregard, cruel and unusual confinement and punishments

which involve the unnecessary and wanton infliction of pain, This aspect of the Eighth Amendment is involved in this case. Plaintiff also brought action under the Americans with Disabilities Act, Title II of the A.D.A., 42 U.S.C. §12132., 42 U.S.C. § 12131 (1)(B). 42 U.S.C. § 12101 et seg. ADA 42 U.S.C. §1997 et seg., the Civil Rights of Institutionalized Persons Act. Also, 42 U.S.C. § 2000 e 2 (m), 42 U.S.C. § 1988 and Title VII, This Court has jurisdiction under 28 U.S.C. § 1343. Plaintiff invokes the pendent jurisdiction of this court.

2. The Plaintiff, a handicapped Patient who was transffered [*sic*] away from a medical handicapped prison, To a non medical non handicapped prison, Plaintiff was denied and refused admission because of his medical history of hypertension Phychological [*sic*] problems and deterioration and also his handicap. Plaintiff sued Defendants Ga. Dept. of Corrections, J. Wayne Garner, A.G. Thomas, J. Sikes, O.T. Ray, J. Brady and *C.O. II Whimbly C.O. II—Margaret. Patterson*, _____, _____, _____, alleging that the exclusion violated the Americans with Disabilities Act of 1990 (ADA) Title II of which Prohibits "Public entity" from discriminating against the Plaintiff.

3. The above named Defendants have discriminated against the Plaintiff because of race and Disabilities when they transffered [*sic*] him away from the medical prison and refused and/or denied and/or excluded him from participation in MH/MR services, programs, and activities of the Prison (G.S.P.).

4. The Plaintiff seeks declaratory and injunctive relief, Prospective equitable relief, Reinstatement Back to the Medical Prison.

5. In this action Plaintiff are also alleging disparate treatment.

6. The Plaintiff also challeng [*sic*] his continued confinement in segregated environment, on the grounds of unlawful disability-based discrimination. Defendants have confined Plaintiff to (G.S.P.) where that Plaintiff could be appropriately treated in more integrated community setting. See Attorney General's consistent interpretation of regulation prohibiting State from providing services to individuals with disabilities in unnecessarily segregated setting was entitled to substantial deference. Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. §12132; 28 C.F.R. §35.130(d).

7. The Defendant's failure to live up to its duty to provide a reasonable accommodation is unlawful disability–based discrimination under §35.130(d); the failure to provide the most integrated services appropriate to the needs of disabled persons constitutes unlawful disabiliy [*sic*]–based discrimination. Here the Defendants has violated the core principle underlying the A.D.A.'s integration mandate.

8. Each Defendant is being sued individually and in their official capacity.

9. Defendants are ultimately responsible for the training and supervision of this Prison (G.S.P.).

10. Plaintiff states the conduct, acts and omissions as complained of herein committed by the named defendants individually, jointly and in concert did deprive and deny Plaintiff of rights, benefits, privileges and immunities secured and guaranteed by the United States constition [*sic*] and law thereof.

11. Plaintiff states each named defendant herein this cause of action were at all material time acting over and/or under color of state law.

DISCRIMINATION

12. Plaintiff belongs to a protected class and was qualified for the position held; Plaintiff was discharged away from the medical prison despite his qualifications; and was replaced by a person outside of the protected class or was discharged while a person outside of the class with equal or lesser qualifications was retained.

13. The Plaintiff is black and is a member of a group protected by the anti-discrimination laws at issue in this case. Addition [*sic*], the Defendants housed a white person to fill the Plaintiff's position. The Plaintiff was at least as qualified as the white person to be housed in the medical prison at the men's C.I.,

14. Defendants A.G. Thomas and J. Wayne Garner degraded the Plaintiff by equating state prisons with slave auctions, by impliedly threatening the Plaintiff with references to the Klu Klux Klan, and by essentially telling the Plaintiff that he was worthless because of his race.

15. The above Defendants and their agents has separate housing units for black patients based on race. There is racial discrimination by the above named defendants and their agents in the assignment to the prison INF. cells and also to the assignment to prison segregation and s/c units. Patients of color has been refused and denied of the better living area & cells because of their race or given only the menial cells while caucasian prisoners are assigned to the higher status and better living areas. The above named defendants and their agents are discriminating against black

patients, Black patients are being discriminated against and denied of the INF. cells, Evidence showes [*sic*] that black patients are disproportionately overrepresented in punitive segregation units and that they are the overwhelming majority punished.

16. The above named defendants and their agents have a racially stereotypic and demeaning attitude toward the Plaintiff and other patients of color, e.g., "blacks are more aggressive than caucasians" and/or "blacks are afraid of a bath and are very low life's, disgusting and nasty.

17. 95 percent of the patients assigned to punitive segregation over the past year are patients of color when they represent only (5) percent of the prison population.

18. Plaintiff have found that the classification procedures of the penitentiary (G.S.P.) are inadequate, This results in overclassification of a substantial number of prisoner, such that these prisoners and the Plaintiff are placed in maximum custody, when lesser degrees of custody would suffice. The principal reasons for this are that there are insufficient staff members to give adequate time to each case, and staff members are inadequately trained.

19. The above acts was did in retaliation & discrimination and has deprived the Plaintiff and other patients of color of an interest or right which has been granted to them, Pursuant to a rule, statute, or regulation promulgated by the State and such interest do require procedural due process.

CELLS TEMPERATURE

20. Plaintiff are being confined in a cold cell with no clothes or shoes, and with a plastic-covered mattress, filth on the cell's floor and walls, deprivation of running water, and the earlier occupancy of the cell by an inmate afflicted with an *HIV* virus. The temperature was as low as 45 degrees, that it was "ice cold", that Plaintiff slept in his wheel chair. Plaintiff was confined in a cell where his w/c, was initially the Plaintiff's bed. A mattress was furnished at a later date, it was so cold that the Plaintiff tore open the mattress and nestled inside.

21. The Plaintiff are being confined in a cell without clothing or shoes, where sleep are impossible and that he are being forced to set [*sic*] in his w/c, 24 hr. per, day. These conditions, too violated his Eighth Amendment rights in the absence of mental derangement. Plaintiff states that the heat in his cell was maintained at an unreasonably low temperature and that there's this big large, loud, noisy, powerful roaring machinery on the out side of the window of the cell which blows air into the cell, this machin [*sic*] blows hot air into the cell during the summertime, and blows cold air into the cell during the winter time, and roars 24-hr. per day which inflicts pain without Penological justification. The lack of heat as well as the lack of ventilation was "severe enough to produce physical discomfort."

22. The Plaintiff have been diagnosed with a medical history of headaches, heartaches, and spine problems and pain, Includes asthma and bronchitis which requires the use of ventolin. He have confined to a w/c for more then (7) years, and he is being kemped [*sic*] in a very small cell [K-1-cell#8] (12-feet long and 3-feet

wide) which he can not ture [*sic*] his w/c around in side [*sic*] of this cell. Also, during the summertime there's very little ventilation in side of this cell, He have a very hard time trying to breath inside of this cell. The temp inside of this cell are very high and there are also very high % of humidity inside of this cell, which caused him very bad pains at chest with shortness of breath and blackouts.

23. The Defendants can not simply allow the prison cells to become an ice box in the winter and sauna in the summer, also, heating and ventilation and A.C. which is excessive for some areas and inadequate for others is one of a totality of conditions that violate the Constitution.

RETALIATION – SEE GRIEVANCE #517-98-0466

24. Plaintiff that the [K-1 unit] cells lacks facilities for the disabled "for hygiene, drinking and performing body excretion functions."

25. Defendants and agents have in various ways retaliated against Plaintiff for filing lawsuits, for instance, whereas before this and other lawsuit Plaintiff was assisted in using the toilet, and bed, now he is given no assistance at all and has fallen off the toilet and suffered injuries from the fall.

26. On 2/6/98, the date of the hearing in the cases *Goodman v. J. Wayne Garner, et al.*, - CV-#697-107 and CV - #697-65. one (1) of my two (2) approved rings was confiscated by Defendants and their agents, This was did in retation [*sic*] for utilizing the 42 U.S.C. § 1983 Procedures. This was did to punish the plaintiff by the Defendants, for engaging in constitutionally protected activity. On 2/13/98, Plaintiff filed grievance against defendants and their agents see—grievance #517-98-

0466. On 3/11/98, defendant Sikes' responded to the grievance stating: The ring will be returned to you. On 3/18/98, at approx. 2:00 p.m. C.O. II Mr. C. Durrence returned plaintiff ring back to him, But one (1) of the stones (sets) were missing from the ring. On 3/18/98, plaintiff file his appeal to the Division Director. On 3/24/98, Investigator Mr. John Cook from the Division Director's office came down to his cell to talk with him concerning the above named ring, On 3/24/98, Investigator John Cook ordered C.O. II Ms. Mary G. Ceasar to confiscate plaintiff's ring. As of this date plaintiff have not received a response from the Division Director office.

GRIEVANCE PROCEDURE & P.L.R.A.

27. Pursuant to Georgia statewide Grievance Procedure Reference #B05-0001. Effective Date: 1/1/96, states as follows: The Warden's/Superintendent has thirty (30) day to respond to the grievance. However, the Warden can place a ten (10) day extension on the grievance in order to review and/or conduct the investigation, the Warden can only request a ten (10) day extension which would be a total of forty (40) days to respond to the grievance. The inmate then has four (4) calendar days to appeal the Warden's response. The next step is to appeal the grievance to the Division Director who has ninety (90) days to respond to the grievance, see grievance #517-97-1551, the Division Director can not request any extensions he has only (90) days to respond which ends the grievance within a total of one hundred and thirty (130) days which would also exhaust plaintiff's administrative remedies.

28. Georgia Dept of Correction & the George State Prison are refusing to make timely responses to the inmate grievance forms. The Georgia Dept. of Cor-

rection are not in compliances with their own rules & regulations, and it takes them more than a year to make a final response to the inmate Grievance forms.

29. Pursuant to, a court order dated Jun. 25, 1998, from Magistrate James E. Graham, and District Judge William T. Moore of the Southern District of Ga. in the case of *Tony Goodman v. J. Wayne Garner et. al*, Civil Action No. CV-697-107, states as follows: "Quote" Georgia State Prison's Local operating procedure 503.1 Provides the proper procedure that an inmate must follow to file a grievance. The inmate is required to file a grievance with his counselor, and if the grievance is denied, the inmate may appeal the outcome to the Division Director. only after the Division Director denies an inmate's appeal has the inmate exhausted his administrative remedies, "unquote" [.]

30. If the Plaintiff does not receive a response from the administrative grievance program within the two years statute of limitations, and if cause of action accrued two (2) years before the statute of limitation ended, and Plaintiff did not file complaint because the prison administrative grievance program refused to file a response to Plaintiff's grievance within the two (2) years of statute of limitation, would Plaintiff's claim be barred?

ACCESS TO THE PRISON LAW LIBRARY

31. The above named Defendants have denied Plaintiff of adequate access to the law Library because simply providing Plaintiff with a copy of pages from a book in his cell, if he requests them, gives the Plaintiff no meaningful change [*sic*] to explore the legal remedies that he might have. Legal research often requires browsing through various materials in search

of inspiration; tentative theories may have to be abandoned in the course of research in the face of unfamiliar adverse precedent. New theories may occur as a result of a chance discovery of an obscure or forgotten case. Certainly plaintiff unversed in the law and the methods of legal research will need more time or more assistance than the trained lawyer exploring his case. It is unrealistic to expect the Plaintiff to know in advance exactly what materials he needs to consult.

60-80 SQUARE FEET

32. Overcrowding necessarily involves excess limitation of general movement as well as physical and mental injury from long exposure. The finding that 60 square feet of living space was the minimum amount of square footage which the Eighth and Fourteenth Amendments require that the defendants provide to the Plaintiff, a necessary corollary to this ruling is that the defendants must provide within such living space reasonably adequate ventilation, sanitation, bedding, hygienic materials, and utilities (i.e. hot and cold water, light heat, + plumbing). In short, the defendants must provide to the Plaintiff shelter which does not cause his degeneration or threaten his mental and physical well being, But the Plaintiff are being denied of that shelter. Plaintiff are not considered member of the general prison population since he is locked in his cell on average of 23-24 hours a day. This cell do not provide him the 60 square feet of space required. Plaintiff note that there is a wide-spread deficiency in living space aside from the deficiency in cell size, the building where the Plaintiff live is in a serious state of disrepair and fail to meet minimal health and safety needs of the Plaintiff. For example, the existing heating and ventilation systems are incapable of providing adequate temperature

control and ventilation in the cellhouses used by the Plaintiff. Defendants has allowed the prison cells to become an "ice box" in the winter and a sauna in the summer, also, heating and ventilation which is excessive for some areas and inadequate for others is one of a totality of conditions that violate the constitution. In adequate [*sic*] ventilation, especially in the cells and shower areas, results in excessive odors, heat, and humidity with the effect of creating stagnant air as well as excessive mold and fungus growth, thereby, facilitating personal discomfort along with health and sanitation problems. For the last (10) months Plaintiff have been forced to sit in his own waste, denied of catheter, denied of rehabilitative exercises, denied of assistance in being transferred from his w/c, to the bed all of which resulted, among other things, in the Plaintiff not getting a bath or a shower for (10) months. The bedding in Plaintiff's cell was heavily stained and soiled, and was not cleaned or changed when he was assigned to the cell without doubt the defendant's inability to meet minimal shelter and sanitation standards contributes immeasurably in making the main living areas unfit for human habitation, unquestionably, the small cells in which Plaintiff are confined, along with the deteriorating and unsanitary conditions in the main living area, have a direct detrimental impact on the health and well being of the Plaintiff. The conditions in which the Plaintiff are confined at (G.S.P.) are "grossly inadequate and constitutionally impermissible.

Plaintiff appeal all adverse decision to the highest level possible in the administrative procedure, see the below grievances:

517-97-2297
517-97-0297
517-98-0080
517-97-1623
517-98-1762
517-96-1080
517-98-0766
517-98-2347
517-98-2128
517-98-0817
517-98-0466
517-98-1157
517-98-1678
517-98-1083
517-97-1551
517-97-0235
517-97-2481
517-97-0234
517-97-1031
517-97-1422
517-97-1030
517-97-2289
517-98-0819
517-96-2191
517-98-1356
517-96-1081
517-98-1524
517-98-0818
517-98-2190
517-97-0041
517-97-1997
517-96-2478
517-97-0589
517-97-2459
517-98-0079
517-96-2252
517-96-1589
517-98-1084
517-97-1372
517-97-1815
517-98-0766
517-97-0938
517-98-1357
517-98-1904
517-98-2127
517-98-2347
517-98-2128

PHYSICAL PLANT

33. The Plaintiff found that the Physical Plant at the penitentiary was old, dilapidated, and ill-maintained, "These conditions were found to have serious health implications for Plaintiff, inmates and staff." More specifically the Plaintiff found: 1.) overcrowding posed an increased threat of the transmission of communicable diseases. Cell sizes as prescribed by the (A.C.A.) were required. (2.) Lighting was substandard. This caused Plaintiff eye strain and fatigue and hindered attempts to ensure that basic sanitation was being maintained. (3) Plumbing was unsatisfactory and presented a threat of waste water contamination of drinking water. (4.) Fire prevention was substandard, creating danger of fire in most living areas. (5.) Food service did not meet public health standards. Problems included temperatures at which food is stored, rodents, and unsanitary conditions. (6.) There are evidence of vermin infestation throughout the prison. (7.) The prison lacked an effective preventive maintenance pro - gram . (8) Ventilation are inadequate and air is generally dank. (9.) There are serious safety hazards in occupation and living areas. (10) Cell cleaning supplies were inadequate and often unavailable. The Plaintiff concludes that "the general condition of the Penitentiary's Physical Facilities when considered in their totality . . . Falls below minimum standards of decency and conditions of confinement and violates Plaintiff's Eighth Amendment rights.

FOOD SERVICE

34. The above named defendants and their agents are in violations, the health department standards and codes, in determining whether the conditions in the food service area violate constitutional standards. As

Plaintiff noted earlier, the State and the above named defendants must provide Plaintiff with a "healthy habilitative environment." This includes providing nutritionally adequate food that is prepared and served under conditions which do not present an immediate danger to the health and well being of the Plaintiff who consume it. Inmate and Staff workers are not given basic instruction on food protection and food service sanitation. Food when it is being served to Plaintiff, is kept at substandard temperatures due to the improper use of the available equipment. Plaintiff will uphold his findings and conclusion that the conditions in the food services areas at (G.S.P.) "are grossly inadequate and constitutionally impermissible." See-Grievances #517-98-1357, 517-98-1524, 77813, 81290, 517-98-1356, 517-97-1623, 517-98-1157, 517-98-0818, 517-98-1084 & 517-98-0818.

35. The Georgia Dept. of Corrections and the (G.S.P.) are using nonhandicapped vehicles which are not insured by their insurance company to transfer handicapped patients from one place to another.

36. On 5/5/98, at approx. 5:30 a.m. The Defendants and their agents transffered [*sic*] Plaintiff from the Georgia State Prison in Reidsville, Ga. To the federal court-house in Atlanta, GA. The vehicle was not equipped for handicapped passengers/Plaintiff. The above named agents picked Plaintiff up and out of his w/c by his arms and legs and put him inside of the vehicle and the seat which he was seated in was not stabilized or secure, the above named agents fail to stabilize and secure Plaintiff in the seat where he was seated caused him to suffer injuries and pains at head, neck, back, stomach and legs. Plaintiff was forced to ride handcuffed and shackled in the back of a van

without seatbelts or restraints. As a result, he fell to the floor and lost consciousness several times. Upon, Plaintiff's arrival back here at (G.S.P.) which was at approx. 5:00 p.m. Plaintiff made request to C.O. II Hays and C.O. II B. Smith, to see someone from medical, Mr. Hays called the medical dept. but medical failed to prescribe pain medication or proper bedding, medical also refused to see or exam the Plaintiff.

36. On 8/26/98, at approx. 9:00 p.m. I was trying to transfer from the toilet to my wheel chair, with the fact that the toilet set [*sic*] which is over his toilet is not stabilized or secure and this cell is much to small, Plaintiff had to literally hurl himself from his w/c onto the toilet, when he attempted to return to his w/c, the Plaintiff slipped and fell onto the floor causing an epileptic seizure, and leg + foot injurey [*sic*]. Plaintiff fell to the floor broke his right toe and crushed his right knee. J. Sikes, J.W. Garner, A.G. Thomas, J. Brady, O.T. Ray, Dr. Lowry, DC Mailloux, Barbara Werth, L. Waters, J. Bradford, J. Paris and Lynn D. Smith had knowledge and notice that he was not secured, safe or stabilized in this cell, Despite the above named agents knowledge of his precarious and perilous placement within the prison/cell the above named agents proceeded to house him in a prison cell which was in total disregard of his health, safety and well-being.

37. On 4/8/98 at approx. 1:00 p.m. C.O. II Whimbly took a toilet set [*sic*] into the shower for the Plaintiff to sit on while showering but the toilet seat is not accessible, Plaintiff was trying to transfer from his w/c to the toilet chair but the toilet seat turned over and he fell to the floor and was hurt at the head, neck left arm, nurse make came down to the unit (K-1) and took his b/p and

then walked away. Plaintiff was denied x-rays, or any other medical care.

ACOUSTICAL WALL COVERINGS

38. Plaintiff request the above named defendants to install, inter alia, sound-absorbing wall coverings in the K-1-unit, because the level of noise in the K-1 unit inflicts pain without penological justification. There's this big large, loud, noisy, powerful roaring machinery on the outside of the window of the cell which blows air into the cell, this machin [*sic*] blows hot air into the cell during the summer time, and blows cold air into the cell during the wintertime, and roars 24-per day which inflicts pain without penological justification.

LIGHTING

39. In Plaintiff's inspection of G.S.P. he found that lighting throughout housing units was substantially less than that considered necessary for reading, writing and the maintenance of proper personal hygiene. While stating that a minimum of 30 foot candles is considered necessary, the lighting in many cell was measured at less than 10 foot candles. Indeed, of the (14) readings taken in G.S.P. K-1 unit not one met or exceeded the 30-foot candle minimum standard. The lighting level in some cell was as low as 8-foot candles. Also, the near exclusive reliance upon artificial light can in and of itself have a deleterious effect upon the Plaintiff.

PRIVACY

40. On 4/28/98, at approx. 9:30 am C.O. II Margaret Pattterson and two (2) other C.O.'s John Doe's came over to the window of Plaintiff's cell during the time he was putting his catheter on and connecting it to the drainage unit. from approx 9:30 am until 9:35 a.m. agent M. Patterson allowed herself to view his body, at close

range and for extended periods of time, at approx. 9:35 a.m. agent Patterson walked back to her post. At approx. 9:50 a.m. Ms. Patterson again came over to the window of his cell and allowed herself views of his body at close range and for extended periods of time. At approx. 9:55 a.m. Ms. Patterson walked back to her post. This have resulted in retaliatiatory [*sic*] surveillance of his cell activities by Ms. Patterson for purposes of harassment and humiliation. The Policy and practice of according female prison guards full and unrestricted access to all areas of the housing unit of the prison allows the female guards to view him performing necessary bodily functions in his cell and also to view his naked body in the cell area. Plaintiff finds this Policy and practice humiliating and degrading and that it violates several of his constitutional rights: Plaintiff First amendment right to practice his religious beliefs (to observe the "Fundamental Christian tenet of modesty"), his limited fourth amendment right to privacy, and his eighth amendment right to be free from cruel and unusual punishment. Female prison guards allowed themselves unrestricted views of his naked body in cell, at close range and for extended periods of time, to retaliate against, punish and harass him for asserting his right to privacy.

POLYURETHANE FOAM

In the view of the Plaintiff, the most startling "Fire safety deficiency at G.S.P. is the prison's continual extensive use of pillows and mattresses made of Polyurethane foam. That material has been known for years to emit deadly fumes when burned, and G.D.O.C. Policy has for several years prohibited its use. Although Warden J. Sikes states that all Polyurethane mattresses and pillows has been replaced I'v [*sic*]

discovered otherwise. of the 17 G.S.P. INF. cells that I'v [*sic*] checked there were 10 Polyurethane mattresses and 4 Polyurethane pillows in use, also I'v [*sic*] discovered otherwise of the 11 G.S.P.-K-1 unit cells that I'v [*sic*] checked there are 2 Polyurethane mattresses in use. Also, the cells in K-1 has no key-locks, the only way the cell doors can be open or closed is through an electric control box, there are no key-locks on any of the cell doors, if it were a fire are [*sic*] some other kind of emergency there would be no way out without further injures [*sic*], because there's only one way to un-lock the cell doors. Fire escape Plans must be communicated to the Plaintiff and prominently displayed in his cell at all times, which the defendants has fail to do. Noting that safety from fire is an aspect of shelter, and as such is properly an area of Eighth Amendment concern. Plaintiff further complain that even where such exits exist, they are ineffective because of the defendants' lack of a fire evacuation plan and failure to prepare for a fire by conducting fire drills. See Grievances #517962191 and 517-98-0819 and 517-98-1084.

42. The Plaintiff have been here at (G.S.P.) for more than two (2) years, and have never had, not one fire drill. The defendants are allowing officers and inmates too [*sic*] smoke inside of the unit, and the smoke alarms repeatedly go's [*sic*] off. Plaintiff is being exposed to fumes from Tobacco smoke, which has caused him pain and sickness of stomach and chest, with the fact that there is no or very little ventilation inside of these cell.

FOOD SERVICE cont'd See Grievance #517962190

The Plaintiff request for a "*steam table*" to be put in the K-1 unit, If other units here at (G.S.P.) can have a steam table, the patients of the K-1 unit can also have a steam table.

CONFIDENTIAL LEGAL MAIL

43. On 7/20/98, at approx. 2:00 p.m. the defendants and their agents gave Plaintiff personal & confidential legal mail to another inmate, and this is not the only's [*sic*] time this have happen. This is a deprivation of his constitional [*sic*] rights, as well as Prison Policy. This will also cause Plaintiff to suffer irreparable injury if he don't get this legal correspondence soon. Such conduct by prison officials is a clear violation of the Eighth Amendment. Plaintiff also, have reason to believe that the officers who delivers the mail are not trained mail officers, and they can not read or write. The above acts was did in retaliation for the exercise of constitionally [*sic*] protected rights against prison officers. Also, on 11/11/98, Defendants and their agents intentionally, understandingly [*sic*], willfully and maliciously deprived and denied Plaintiff of access to the courts and to possess his legal papers to pursue his cases pending at bar of the courts. The deprivation of his legal materials clearly violates the constitution, and also constitutes irreparable injury. Every day the prison officials retain the materials he is delayed in filing his challenge to his cases, and every day increases the risk that the officials will lose or destroy the materials.

44. The Plaintiff sensed that Defendants and their agents harbored some resentment against the Plaintiff because of the racial allegations and claims lodged against Defendants and their agents in this litigation, as well as other litigation. This resentment have very-well lead to an antagonistic relationship between defendants their agents' and the Plaintiff. Moreover, Defendants and their agents have developed even more hostility toward the Plaintiff. Defendants and their agents Ms. Lisa Waters, Carolyn A. Mailoux, Barbara

Werth and McLowery have made death threats against Plaintiff's life.

PLAINTIFF MAKES RELIF [*SIC*] AS FOLLOWS:

A. Plaintiff request that the court appoint amicus curiae, and for the order to provide that the Department of Justice and the United States Attorney "investigate fully the facts alleged in the complaints, . . . participate in the case with the full rights of parties, and . . . advise the court on the public interest(s) at issue." The district court has broad discretion to appoint "*amici curiae*".

B. The Plaintiff respectfully request that he be given access to a copy service, which would give him the opportunity to file the above named grievances.

C. To order the State/Defendants to comply with the A.D.A. and the A.C.A.'s standards relating to the housing of prisoners in segregation, ISO, and protective custody. This creates an extreme hazard to the physical and mental well-being of the prisoner and that the use of these segregation cell is an unnecessary and wanton infliction of pain, without penological justification. Plaintiff are subjected to intolerable, inhumane, and unconstutional [*sic*] conditions. The level of violence was caused by overcrowding, idleness, deteriorating physical plant, inadequate medical and psychological care, and "other condition". The prisoners were suffering from psychological deterioration, which created an atmosphere of fear, anger, and frustration in the prison. There is a pattern and practice of brutality and harassment by the prison guards. Noneless [*sic*], guard brutality was the norm. It was encouraged by peer pressure among the guards and facilitated by indifference on the part of the administration. Guard brutality

included arbitrary shake downs, theft, destruction of the private of inmates assault on the inmates.

D. The long periods of deprivation of basic amenities, with Plaintiff locked in his cell without showers, baths, adequate ventilation or heating, recreation, work, medical and MH/MR care, laundry service, cleaning service, and phone service, render the lock down unconstitutional.

E. There is evidence that defendants and their agents have retaliated against Plaintiff for his involvement in lawsuits and grievances. This retaliation has consisted of verbal harassment, threats, and transfers to other institutions. Plaintiff have the right to petition the courts for redress of his grievances, harassment, threats, and transfers by prison officials that interfere with or penalize the exercise of that right violate the constitution.

F. Grant Plaintiff all attorney fees.

G. Grant Plaintiff prospective injunctive relief.

H. Grant Plaintiff at least $600,000.00 for punitive damages from each individual named Defendant.

I. Grant Plaintiff at least $600,000.00 for pain and suffering from each individual named Defendant.

J. Grant Plaintiff at least $600,000.00 for mental suffering from each individual named Defendant.

K. Grant Plaintiff an Declaratory Judgment and injunctive relief.

L. Grant Plaintiff any further relief as this court may deem appropriate.

M. Plaintiff hereby demands a trial by jury on all triable issues before this court.

N. Plaintiff hereby move, inter alia, for the appointment of counsel.

[Service list omitted in printing]

I declare under penalty of perjury that the foregoing is true and correct.

Date: 12/28/98

/s/ TONY GOODMAN
TONY GOODMAN
G.S.P.

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF GEORGIA
STATESBORO DIVISION

No. CV699-0012
(formerly MC299-01)

TONY GOODMAN, PLAINTIFF

v.

O.T. RAY, ET AL., DEFENDANTS

(Filed: May 17, 1999)

EMERGENCY MOTION FOR T.R.O. AND/OR P.I.

* * * * *

Statement of Facts

* * * * *

On 8/26/98, 12/17/98, 3/16/99, 3/18/99, and 4/11/99, Plaintiff was trying to transfer to or from the toilet, to or from his wheel chair he fell to the floor broke his right toe and crushed right knee. Plaintiff is also suffering from cellulitis to the feet.

On 8/26/98, at approx. 9:00 p.m. Plaintiff was trying to transfer from the toilet to his w/c. The toilet set [*sic*] which is over his toilet is not stabiled [*sic*] or secure, and his cell is much too small. Plaintiff had to literally hurl himself from his w/c, onto the toilet, when he attempted to return to his w/c, he slipped and fell onto the floor causing an epileptic seizure, and leg, hip, toe and knee injuries.

Defendants and their agents has and had knowledge and notice that Plaintiff was not secured, safe or stabilized in this cell. Despite the above named agents knowledge of his precarious and perilous placement within the prison/cell the above named "*Defendants* and agents proceeded to house him in a prison cell which was in total disregard of his health, safety and well-being.

* * * * *

Plaintiff states that "the totality of circumstances in his injures can be held to be unconstitutional" because the evidence clearly shows that his injures [*sic*] "has not improved over the last few year", that his injures [*sic*] has increased significantly under the directorship of defendants and their agents' deliberate indifference and/or reckless disregard to Plaintiff's safety and well being as well as his medical needs.

Plaintiff can not stand or walk and have been confined to a w/c, for (7) years or more. He's suffering from intense legs, arm, back, neck, chest, head, stomach and eye pains with cramps and weakness,—Plaintiff do not have any controll [*sic*] over his B/M or urine.

On 5/12/99, at approx. 11:00 a.m. Plaintiff had a B/M and urine, on himself, He requested to the S.M.U. Capt. Mr. Brown, Mr. Smith, and Mr. Hall for cleaning supplies, laundry service and assistin [*sic*] in cleaning his w/c, and cell, but they all refused to do so. He was forced to live in a cell where the floor was smeared with defecation and urine. Despite his requests to the above named agents for cleaning supplies and assistin [*sic*], he was required to live and sit in his own body waste. The above named Defendants and agents has observed Plaintiff in pain and the holing [*sic*] of his head stomach

and leg and ignored repeated indications of worsening condition. Even though prison physicians state that care currently provided to prisoner is adequate, court rules that treatment prescribed by outside physicians must be provided to paraplegic prisoner; among the treatment described by prison physicians as adequate was treatment that provided no special toilet facilities for the prisoner, but instead required him to lie in his own waste, failure to change or clean catheter, failure to provide rehabilitative exercises, and failure to provide any assistance in preventing dangerous bedsores. See *Lee v. McManus*, 543 F. Supp. 386, 389-93 (D. Kan. 1982).

On 11/3/98, Plaintiff made request to Counselor L. Smith for MH/MR services. Mr. Smith told him that he would make him an appointment with mental health, but no appointment was ever made.

On 12/3/98, Plaintiff made a request to MH/MR Counselor Mr. Shryock for mental health services, he told the Plaintiff that he would make him an appointment with Dr. Ann Chistie, as of this date Plaintiff have not been seen by anyone from mental health.

On 5/7/99, at approx. 10:00 a.m. Plaintiff made requested to Counselor Seago for MH/MR services and she said she would make him an appointment with mental health, as of this date Plaintiff have not been seen by anyone from mental health, he have been denied of those services.

Plaintiff is being discriminated against because of his disabilities, and this type of transfer was made to punish the Plaintiff for engaging in constitionally [*sic*] protected activity. Defendants and their agents has impended danger against Plaintiff's life this was did in

retation [*sic*] for utilizing the 42 U.S.C. § 1983 procedures against the State of GA.

Argument and Citation of Authority

F.R.C.P. authorizes the trial court to "make any order which justice requires to protect a party or person from pain and suffering, reckless disregard and deliberate indifference. The Plaintiff is presently being held by the GA. Dept. of Corrections and has a history of medical problems and is presently suffering from those problems which is causing disastrous effects on the mental and physical health of the Plaintiff.

* * * * *

Conclusion

Plaintiff respectfullys [*sic*] request that this court grant his motion for a Protective Order.

This 14th day of May 1999

G.S.P.

/s/ TONY GOODMAN
TONY GOODMAN

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF GEORGIA
STATESBORO DIVISION

[Caption omitted in printing]

Plaintiff's Motion to Amend His Emergency Motion for T.R.O. and/or P.I.

(Filed: May 24, 1999)

On 5/14/99, at approx. 6:00 a.m., Plaintiff Goodman was in need of a B/M, he was trying to transfer to the toilet, from the w/c, but he fell to the floor broke his left foot and crushed his left knee, he then had a B/M on himself, on his w/c, and on the floor, at approx. 6:15 a.m. Captain Brown, came over to Plaintiff's cell and observed him on the floor in pain, at that time Captain Brown, ordered Plaintiff to clean his cell, Plaintiff told him that he could not stand or walk and that he could not clean the cell because he is not able to do so. Plaintiff Goodman then sought help with Captain Brown for medical care and treatment but Plaintiff's request for medical care and treatment was denied and ignored by Captain Brown.

Because Plaintiff Goodman is not able to clean his cell Captain Brown removed all legal materials and other property from Plaintiff's cell. Plaintiff is being denied of all privileges and rights that other similar security inmates have access to.

As of to date Plaintiff are being denied of access to his legal materials and, to the law library, which is in retaliation. Pursuant to F.R.C.P. (41); and local Rule 15.1. If, Plaintiff does not press these cases forward, the courts may dismiss them for want of prosecution. I do not want my cases dismissed.

It is furthermore a fact and reality defendants and their agents have intentionally, understandingly, willfully and maliciously deprived and denied Plaintiff Goodman of access and/or possess his legal papers to pursue his cases pending at bar of the courts. Plaintiff Goodman would be grateful if the court would consider a motion pursuant to Rule 65, FRCP) for a T.R.O. and/or P.I., or a protective order. Plaintiff has attempted by letter to Defendants and their agents in order to end these problems, but it have did no good.

Warden Hilton Hall and the S.M.U. Manager Mr. V. Smith, has–and–had knowledge of Captain Brown's activities but fail to take corrective measures amounted to deliberate indifference and reckless indifference.

1.) No, Plaintiff do not have access to the windows of his cell because he can not stand.

2.) No, Plaintiff do not have access to the wall plugs of his cell because he can not stand.

3.) No, Plaintiff do not have access to the bed of his cell because he can not stand and have been forsed [*sic*] to sleep in his w/c, for more than two (2) years.

4.) No, Plaintiff can not turn his w/c, around inside of his cell or the shower because the cell ano also, the shower are much too small, and Plaintiff have not had a shower for more than two (2) years.

5.) Yes, able-bodied inmates have access to the above location, but the Plaintiff do not have access to the above location, because the location are not accessible from his w/c.

* * * * *

As of this moment I am in great pain & am in need for emergency help, I am being housed & treated as if I am a isolation inmate being hidden with no rights at all.

As a matter of law, the continuing deprivation of constitional [*sic*] rights, constitutes irreparable harm. See *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673 (1976).

The Plaintiff is threatened with irreparable/harm because of the nature of his injury, with loss of movement and function. If he does not receive proper treatment at the proper time, he may never walk normally again. He is also sufering [*sic*] from anxiety and depression.

This is a Declaration In Support of Plaintiff's Motion for a T.R.O. and/or Restratning [*s i c*] Order/Preliminary Injunction.

Pursuant to 28 USC § 1746, I certify under penalty of perjury that the foregoing is true and correct. Executed on this 16th day of May, 1999.

G.S.P.

/s/ TONY GOODMAN
TONY GOODMAN

* * * * *

[Service list omitted in printing]

[EXHIBIT A]

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF GEORGIA
STATESBORO DIVISION

[Caption omitted in printing]

PLAINTIFF'S AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

(Filed: May 24, 1999)

I, Tony Goodman do declare under the penalty of perjury the information set forth herein below are true and corect [*sic*].

1.) I am the Plaintiff named in the above-styled case.

2.) I file this cause of action in good faith.

3.) I verily believe I am entitled to the redress herein. I do not enter and file this cause of action for any type of harassment and undue hardship and burdensome upon defendants.

4.) I state the named actions by defendants "set forth herein this cause of action and intelligently, understandingly, knowingly and voluntarily deprived and denied me certain rights, benefits, privileges and immunities secured and guaranteed to me by the United States Constitution and law thereof.

5.) The (P.H.S.) (D.O.C.) and (G.S.P.) are responsible for providing all doctors, nurses, physician assistants, therapists', physician and other medical staff at State prisons, probation detention centers, halfway houses, and prison boot camps.

6.) The Delaware company that landed a five-year $300 million medical contract to care for state inmates during October-1995, were fined $260,000 for staffing shortages at two prison in isolated areas of the state, documents show.

7.) The Dept. of Corrections also has notified Prison Health Services Inc. that it could be fined another $10,000 a day for unacceptable staffing shortages at four other prisons.

8.) In the first month of the contract, which began Oct. 1, 1995, PHS failed to provide enough medical personnel at the Georgia State Prison at Reidsville and the Telfair Correctional Institution at Helena, triggering the $260,000 fine.

9.) This company is also financially responsible for medical tests, specialized treatment and emergency care for almost 40,000 men and women in Department of Corrections custody. The detailed contract—the largest of its kind in the nation—spelled out how many health care professionals must work at each facility, how long doctors must spend with inmates and how quickly they must report test results which (P.H.S.) (D.O.C.) and (G.S.P.) has failed to do so. Pursuant to the contract, Regulation and (S.O.P.'s) and also to the safety and well being of myself as well as other patients here at the (G.S.P.). The above named Defendants are in violation of their own contract, Regulation, and (S.O.P.'s)—*AS OF TO DATE*, there's only one (1) Doctor here at (G.S.P.). (PLEASE SEE EXHIBIT "B")

10.) The above named defendants and their agents must/but has refused to meet the medical needs of disabled plaintiff and furnish the assistance that he require in order to live a minimally decent life in prison.

The defendants must/but have refused to take plaintiff as they find him and provide facilities compatible with his physical condition that meat [*sic*] civilized standards of decency, as follows: A) The space allowance and reach ranges for wheel chair person's inside of the bathrooms at the library, gym, church and other area of this prison (G.S.P.) do not comply with (A.D.A.) standars [*sic*].

11.) This building (G.S.P.) Reidsville, GA., is not wheel chair accessible.

12.) The bathroom and buildings at this prison (G.S.P.) do not have accessible routes or (EXIT).

13.) The (G.S.P.) Reidsville, GA. Do not have accessible wheel chair ramps, doors, entrances, drinking fountains and/or water coolers, toilet stalls, shower stalls, toilet rooms, sinks, or alarms.

14.) The above named defendants and their agents have knowingly assigned plaintiff to a prison that would aggravate serious medical ailment, and force bodily harm upon him, and further injury to his serious medical ailments is unnecessary and wanton infliction of pain.

15.) I am suffering from multiple level spinal involvement with injuries to all levels of the spine secondary to a motor vehicle accident. I am also suffering from bilateral cervical pain in the nuchal [*sic*] and occipital regions with bilateral trapezius involvement, and symptoms have worsened over the past several months. Finally, the medical treatment given to me by Dr. Jacobs was so bad that it is the same as, or worse than, no treatment at all. From 6/18/96, to date, I have made request after request through (P.H.S.), (D.O.C.), (G.S.P.) and their members and/or agents concerning

physical therapy and/or surgery, and my requests has been repeatedly denied. (Please See Exhibit "D").

16.) I can not stand or walk and have been confined to a w/c for four (4) years or more, I am suffering from intense legs, arm, back, neck, chest, stomach, head and eyes, pains with cramps and weakness. I can not bend my neck downwords [*sic*] without intense neck and back pains, also, I do not have any control over my B/M, and it's very hard for me to discharge my urine. I have been diagnosed as having bulging disc at the C6-7 level. An anterior wedge fracture of T6 vertebral body, and an herniated disc at the L5-S1 level toward the left side.

17.) From 6/18/96 TO DATE, I have requested to the above named Defendants for cleaning supplies, laundry service and assistin [*sic*] in cleaning my cell, but the defendants and their agents has refused to do so. I am being forced to live in a cell where the walls and floors are smeared with human defecation, Despite my requests to (defendants) for cleaning supplies. I am required to live and sit in my own feces and other body waste. This was did in retaliation.

18.) Because of my disabilities I'm being denied of all "privileges and rights" which other similar security inmates have access to, such as: counseling services, educational servicess [*sic*], college program, vocational training, recreation activities, freedom of-movement in the unit and institution, television, phone calls, entertainment—and religious rights.

19.) I am being denied of needed corrective surgery, and other medical care & treatment which has caused my condition to worsened, this has taken the form of

punishment and I have been confined to solitary confinement cell.

20.) I think it is unconstitutional a Georgia statute which allowed the "*transfer* and *housing* of the plaintiff to a prison which is not "equipped" for handicapped patients (such myself). Because the loss of liberty produced by an involuntary commitment is more than a loss of freedom from confinement, such transfers require the protections of procedural due process, including notice and a hearing of which the prisoners is provided qualified and independent assistance, which plaintiff Goodman have been denied of. Also, Pursuant to the (A.D.A.) states prisoners with disabilities or handicaps are protected both by the Constitution and by federal statutes under the Constitution, prison officials must meet the medical needs of disabled prisoners and furnish the assistance that plaintiff Goodman, required in order to live a minimally decent life in prison, which the undersigns are also being denied of.

21.) I certify under penalty of perjury that the foregoing is true and correct. Executed on this 13th day of May, 1999.

G.S.P.

/s/ TONY GOODMAN
TONY GOODMAN

[EXHIBIT C]

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF GEORGIA
STATESBORO DIVISION

[Caption omitted in printing]

DECLARATION [OF TRACY MILLER] IN SUPPORT OF PLAINTIFF'S MOTION FOR A T.R.O. AND/OR P.I.

(Filed: May 24, 1999)

1.) The Plaintiff is being kemped [*sic*] in a very small cell [K-1-cell #8] which is about 12-feet long and 3-feet wide) in which he can not ture [*sic*] his W/C, around inside of the small cell, Also, there's very little ventilation and a lot of humidity/heat inside of his cell, temp., —(F) inside of his cell are very high and there are very bad %'s of humidity inside of his cell. Plaintiff have been deliberately exposed to bitterly hot temperatures for a long time, his solitary confinement cell is extremely hot. The lack of adequate "a/c & ventilation" inside of his cell with the fact that he's rarely or never allowed out of his cell has caused a problem condition. Prison officials have simply allowed the prison cells to become an ice-box in the winter and a sauna in the summer.

2.) The shower is much too small for the Plaintiff to turn his w/c around inside, and there is insufficient ventilation inside of the shower, which undermines the health of the Plaintiff and the sanitation of the istitution [*sic*] itself.

3.) Pursuant to (G.D.O.C.'s) policy; onse [*sic*] an inmate serve (14) days in solitary confinement and

awaiting additional s/c, time, the inmate/Plaintiff should come off of s/c for one (1) day. However, (G.S.P.) have made their own policy, and Plaintiff Goodman are being required to serve 42 days in s/c. The Disciplinary Committee,: Gregg Steward, R.D. Callens, R. King, J. Sikes, O.T. Ray, J. Brady, A.G. Thomas, W. Garner, and Z. Miller have deprived Plaintiff of an interest or right which has been granted to him, pursuant to a rule, statute, or regulation promulgated by the state and such interest do require procedural due process.

4.) The classification procedures of the Penitentiary (G.S.P.) are inadequate. This results in overclassification of a substantial number of prisoners, such that there prisoners/Plaintiff are placed in maximum custody when lesser degrees of custody would suffice.

5.) The above named Defendants are discriminating against Black/Patients, and Black Patients are being denied of the Inf.,-cells, because of their race or given only the menial cells while Caucasian prisoners are assigned to the higher status and better living areas. Evidence showes [*sic*] that black patients are disproportionately overrepresented in punitive segregation units and that they are the overwhelming majority punished.

6.) The most startling fire safety deficien [*sic*] at (G.S.P.) is the prison's continual extensive use of pillows and mattresses made of polyurethane foam. That material has been known for years to emit deadly fumes when burned. Also, the cells in unit k-1, has no keylocks, The only way the cell doors can be open or closed is through an electric control box, there are no keylocks on any of the cell doors, if it was a fire are [*sic*] some other kind of emergency there would be no way

out without further injures [*sic*], because there's only one way to unlock the cell doors.

I certify under penalty of perjury that the foregoing is true and correct. Executed on this 13th day of May, 1999.

/s/ TRACY MILLER
TRACY MILLER
EF #241919-264-71-4614

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF GEORGIA
STATESBORO DIVISION

[Caption omitted in printing]

DECLARATION IN SUPPORT OF PLAINTIFF'S MOTION FOR A T.R.O. AND OR P.I. AS-OF-6/2/99— TO DATE—

(Filed: June 7, 1999)

1. Defendants and their agents are making death threats against Plaintiff's life.

2. Plaintiff suffers from hypertension and his hypertension inhibits his use of the yard and also of his cell (k-1 cell #8)

3. Plaintiff is being retalted [*sic*] against by defendants agents for engaging in constitutionally protected activity.

4. The Defendants are allowing the prison cells to become an ice box in the winter and a sauna in the summer, which caused Plaintiff to head pain & blackout.

5. Plaintiff is being made to go out to the yard without clothing or shoes which caused him very bad pains at head, eyes, chest with shortness of breath and blackouts. As-of-6/2/99 up until to date

6. Defendants and their agents are being deliberate indifference and/or reckless disregard to Plaintiff's safety and well being and also to his medical needs.

7. Plaintiff is repeatedly injured when he attempts to use the toilet and bathroom facilities, bed and shower because those facilities are not equipped for handicapped persons such as himself. As of 6/2/99, to date.

8. Plaintiff is being made to live in a very small cell [k-1 cell #8] (12-foot long and 3-feet wide) which he can not ture [*sic*] his w/c around in side of this cell.

9. The Temp inside of this cell are very high and there are also very high % of humidity inside of this cell which caused him pains and shortness of breath and blackouts. As of to date.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

/s/ TONY GOODMAN
TONY GOODMAN
6/8/99

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF GEORGIA
STATESBORO DIVISION

[Caption omitted in printing]

[Filed: Aug. 16, 1999])

ANSWER OF DEFENDANTS STATE OF GEORGIA AND GEORGIA DEPARTMENT OF CORRECTIONS

Come now Defendants, State of Georgia and Georgia Department of Corrections, by and through their counsel, THURBERT E. BAKER, Attorney General, and show the following as their Defenses and Response to the Plaintiff's Complaint:

FIRST DEFENSE

The Complaint fails to state a claim upon which relief may be granted. The Plaintiff contends he was subjected to unlawful conditions at Georgia State Prison where the Plaintiff has not been incarcerated since June 15, 1999. Consequently, the Plaintiff's claim for injunctive relief is rendered moot and the Defendants enjoy immunity from the Plaintiff's claims for monetary damages.

SECOND DEFENSE

The Complaint fails to state a claim within the subject matter jurisdiction of this Court. The Defendants show on information and belief that there has been insufficiency of service of process and the Court presently lacks jurisdiction over the Plaintiff's Complaint.

THIRD DEFENSE

The Defendants deny that the Plaintiff has been deprived of any rights, privileges, or immunities secured by the Constitution of the United States or the State of Georgia or under the Americans With Disabilities Act.

FOURTH DEFENSE

The Defendants deny that the Plaintiff has been deprived of any rights, privileges, or immunities secured under the American With Disabilities Act.

FIFTH DEFENSE

The Complaint fails to establish that these Defendants have breached any duties which they owed to the Plaintiff.

SIXTH DEFENSE

The named Defendants are cloaked with a qualified immunity from suit.

SEVENTH DEFENSE

Since this suit is a suit against the State of Georgia, the named Defendants assert the defense of sovereign immunity.

EIGHTH DEFENSE

The Defendants show that the application of the Americans with Disabilities Act is an unconstitutional exercise of Congressional authority over state prisons.

NINTH DEFENSE

The Plaintiff's claims against the Defendants are barred by the Eleventh Amendment of the United States Constitution.

TENTH DEFENSE

The Defendants show on information and belief that the Plaintiff has not exhausted administrative procedures which are prerequisite to bringing his claim under the ADA.

ELEVENTH DEFENSE

The Defendants respond to the specific allegations of the Plaintiff's Original Complaint as follows:

1. The Defendants lack information sufficient to form a belief as to the truth of the averments in paragraph one (1) of the Complaint, but are aware the Plaintiff has filed numerous other prison lawsuits during his several incarcerations.

2. The Defendants admit the allegations of paragraph two (II) that he was confined at Georgia State Prison at the time of filing this lawsuit and that GSP has a grievance procedure. The Defendants lack information sufficient to form a belief at that time as to whether the Plaintiff has exhausted his grievance remedies by filing a grievance against each of the named Defendants as to each of the claims set forth herein.

3. The Plaintiff's Complaint has no paragraph III.

4. The Defendants admit the Plaintiff has identified himself and those parties he desires to sue in paragraph IV. Process has been allowed to issue only as to the State of Georgia and the Georgia Department of Corrections.

5. *Statement of Claim*: The Plaintiff has attached a handwritten statement of claims which he identifies by page and paragraph numbers. These responses correspond to the Plaintiff's paragraph numbering system.

   1. The allegations of paragraph one (1) are denied. The Plaintiff is not entitled to the relief described.

   2-3. The allegations of paragraphs two and three are denied.

   4. It is denied the Plaintiff is entitled to the relief described in paragraph four (4).

   5. It is denied the Plaintiff has been the object of unlawful disparate treatment as described in this paragraph.

   6-7. The allegations of paragraphs six and seven are denied.

   8. The Plaintiff has stated his contended basis for his claim in paragraph eight.

   The Defendants show on information and belief that they have immunity under the Eleventh Amendment to his claims for monetary damages.

   9 & 11. The allegations of paragraphs nine (9) and eleven (11) are admitted.

10 & 12. The allegations of ten (10) and twelve (12) are denied.

13. So much of the allegations of paragraph thirteen (13) as show the Plaintiff is black are admitted. All other allegations of the paragraph are denied.

14. The persons named in paragraph fourteen (14) are not defendants and the allegations as to them are denied on information and belief.

15-16, 18-21. The allegations of paragraphs fifteen (15), sixteen (16), eighteen (18), nineteen (19), twenty (20), and twenty-one (21) are denied.

17. The Defendants lack information sufficient to form a belief as to the truth of the averments in paragraph seventeen (17). Therefore, they are denied.

22. The Defendants lack information as to the present diagnosis of the Plaintiff, but show on information and belief he is not a disabled person as contemplated by the ADA or otherwise. All other allegations of paragraph twenty-two (22) are denied.

23. The allegations of paragraph twenty-three (23) are denied.

24. The allegations of paragraph twenty-four (24) are denied. The Defendants show on information and belief that the Plaintiff is not disabled.

25. The allegations of paragraph twenty-five (25) are denied.

26. The allegations of paragraph twenty-six (26) are denied as drawn.

27. The Defendants admit that Georgia State Prison has a prison grievance procedure. Reference is made to the relevant Standard Operating Procedure (SOP) for a more accurate account of its contents and requirements.

28. On information and belief, the allegations of paragraph twenty-eight (28) are denied.

29. On information and belief the allegations of paragraph twenty-nine (29) are admitted.

30. The Defendants lack information and belief as to the truth of the averments in paragraph thirty (30), but show that Plaintiff is not faced with this issue.

31-32. The allegations of paragraph thirty-one (31) and thirty-two (32) are denied. There appear to be two paragraphs thirty-two, one of which carriers the page designation of "pg. 9-A". The Plaintiff lists some 47 grievances he indicates he has appealed. The Defendants currently lack information sufficient to form a belief as to whether these grievances were filed against these Defendants on the subject matter of this lawsuit or whether he has exhausted his grievances by awaiting a final disposition before filing this lawsuit.

33-35. The allegations of paragraphs thirty-three (33), thirty-four (34) and thirty-five (35) are denied.

36. On information and belief, the allegations of paragraph thirty-six (36) are denied.

37. On information and belief, the allegation of paragraph thirty-seven (37) are denied.

38. The allegations of paragraph thirty-eight (38), are denied. The inmate is not entitled to acoustical sound absorbing wall coverings.

39. The allegations of paragraph thirty-nine (38) are denied.

40. The Defendants lack information as to the events of 4/28/98. The remaining allegations of this paragraph are denied on information and belief.

41. The Defendants deny violation of fire safety codes or standards. The remaining allegations of paragraph forty-one (41) are denied.

42. The allegations of paragraph forty-two (42) are denied as drawn. Applicable fire safety precautions are taken in light of the security needs of the prison and its inmates. Access to an inmate steam table is not an issue under the ADA.

43. The Defendants lack information sufficient to form a belief as to the 7/20/98 events. The remaining allegations are denied.

44. The allegations of paragraph forty-four (44) are denied.

6. The Defendants deny each and every allegation of the Plaintiff's Complaint and Amended not heretofore specifically admitted.

WHEREFORE, the Defendants pray the Court:

a. that Judgment issue for the Defendants and that the Plaintiff's Complaint be dismissed with costs assessed against the Plaintiff:

b. that all relief requested in the Plaintiff's Complaint be denied.

c. that the Defendants have trial by jury as to all issues; and

d. that the Court afford such other and further relief as it deems necessary and proper.

This 16th day of August, 1999.

Respectfully submitted,

THURBERT E. BAKER 033887
Attorney General

KATHLEEN M. PACIOUS 558555
Deputy Attorney General

JOHN C. JONES 401250
Senior Assistant Attorney General

/s/ STEPHEN E. CURRY
STEPHEN E. CURRY 202500
Special Assistant Attorney General

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[Service list omitted in printing]

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF GEORGIA
STATESBORO DIVISION

No. CV699-0012

TONY GOODMAN AND, PLAINTIFF

v.

JOHNNY SIKES, A-G. THOMAS, J. WAYNE GARNER, AND ET AL., DEFENDANTS, THE STATE OF GEORGIA

(Filed: Oct. 21, 1999)

[PLAINTIFF'S] STATEMENT OF UNDISPUTED FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

COMES NOW Tony Goodman, Plaintiff named in the above-styled case, through and by themsefs [*sic*], file this statement of undisputed facts pursuant to the local Rule of this Court.

(1). On 6/18/96, Plaintiff was transffered [*sic*] form [*sic*] "Men's C.I." to (G.S.P.)—where he are being confined to administrative segregation 23 hr. pre. [*sic*] day, and are being denied the "full rang" [*sic*] of all privileges and rights that other similar security inmates have access to, which are being did in retaliation for the exercise of constitutional rights.

(2). The above named Plaintiff are being discriminated against because of their disabilities.

(3). Plaintiff's transfer was made to punish him for engaging in constitutionally protected activity.

(4). The State of Georgia (D.O.C., P.H.S, M.C.G., G.S.P., et al.,) are legal entity that may be sued by the Plaintiff.

(5). Plaintiff are being held by the (D.O.C., and G.S.P., et al.,) and are protected by the Eighth Amendment's proscription of cruel and unusual punishment, the Fourteenth Amendment, Due Process Clause, itself, and the laws of the states.

(6). The Americans with Disabilities Act does apply to prisons and does afford a right of relief to Plaintiff for Defendants violation of that Act.

(7). The Defendants have violated their owned (S.O.P.'s), (Policies), (contracts) and (A.C.A. standards).

(8). The Plaintiff have disabilities which confind [*sic*] them to wheel chairs.

(9). Plaintiff can and have demonstrated clearly established right and privileges that was and are being violated by the conduct of all Defendants.

(10). Defendants are dening [*sic*] Plaintiff of medical care and treatment and requiring the Plaintiff to live in a prison which is not properly equipped to secure and house handicapped patients.

(11). The Dr. wrote Plaintiff diagnosis and the directions concerning surgery and physical therapy on a standard prison hospital referral form, contrary to the Dr.'s direction,—we the Plain-

tiff have not been provided with surgery, and/or a course of physical therapy despite Plaintiff' repeated requests.

(12). On the following dates: (8/9/96, 8/20/96, 9/4/96, 9/7/96, and 9/13/96) Due to the fact that (G.S.P. Reidsville, Ga. HC01) is not properly equipped to secure and stabilize and also house handicapped patients including Plaintiff, Plaintiff was trying to transfer from their wheelchairs to the toilet and bed without the help of handicap bars and fell to the floor and was hurt.

(13). Plaintiff have been housed in a prison (G.S.P.) where the law library, church, gymnasium, and yard has no accessible toilet stalls, drinking fountain, sink, ramps or alarms, also the space allowance and reach ranges for w/c persons inside of the bathrooms and the gymnasium, law library, church and yard is not w/c accessible.

(a). On the following dates: 6/22/96, 8/9/96, 8/20/96, 9/13/96, 11/23/96, 11/25/96, 7/31/97, 12/24/97, 6/28/97,—due to the fact that (G.S.P. Reidsville, Ga. HC01) is not properly equipped to secure and stabilize and also house handicapped patients including Plaintiff Goodman, Plaintiff Goodman was trying to transfer from his w/c, to the toilet and bed without the help of handicap bars and fell to the floor and was hurt.

(b). Plaintiff Goodman have made requests after requests to Defendants and their agents to repair his personal w/c, in Plain-

tiff's requests he also relieved defendants of any and all responsibility associated with the repair or attempt to repair his w/c/ Defendants and their agents refused to repair the w/c.

(c). Plaintiff Goodman is being discriminated against because of his disabitiles [*sic*], and this type of transfer was made to punish the Plaintiff, by the Defendants, for engaging in constitutionally protected activity, Defendants has impended danger against Plaintiff's life this was did in retation [*sic*] for utilizing the 42 U.S.C. §1983 procedures.

(d). Defendants should have known that their actions and policies could violate the Eighth Amendment.

Considering all the evidence with all reasonable inferences favoring Plaintiff, reasonable persons could find that Defendants has responsibilities and authority relating to care and treatment of Goodman and that they acted with deliberate indifference to Goodman's serious medical needs. [Please see Exhibit "P"]

(14). The above-named Plaintiff are being denied of all "Privileges and Rights" which other similar security inmates have access too, such as: counseling services, educational services, college program, vocational training, recreation activities, freedom of movement in the unit and institution, television, phone calls, entertainment, and religious rights, also we are being denied of medical supervision and education,

concerning "DIABETES and HYPERTENSION."

(15). The space allowance and reach ranges for wheelchair persons inside of the bathrooms at the (G.S.P.) do not comply with (A.D.A. stander's [*sic*]), this building the (G.S.P.) is not wheelchair accessible, the bathrooms at the (G.S.P.) do not have accessibl [*sic*] routes, the (G.S.P.) do not have accessible wheelchair ramps, doors, entrances, drinking fountains and water coolers, toilet stalls, shower stalls, toilet rooms, sinks, or alarms.

(16). The above named defendants and their agents have knowingly assigned Plaintiff to a prison (G.S.P.) that would aggravate serious medical ailment, and force bodily harm upon him, and further injury to their serious medical ailments is unnecessary and wanton infliction of pain.

(17). From 6/18/96 to date, Plaintiff has made requests through the health services request form and also through letters to defendants Stuart Shapiro, Louise Cason, Jacobs, Padden, Michael Spradlin, Johnny Sikes, Jerell Powell, Derwin Cox, J. Wayne Garner and A. G. Thomas, concerning their medical needs and problems, but their request has been repeatedly denied and "no" treatment given.

(18). Defendants and their agents have and are refuse to allow Plaintiffs to see a doctor even when they know Plaintiff was seriously ill, The above named defendants denied and/or delayed treatment that was needed quickly for a painful health problem. Finally, the medical care given

to the plaintiffs by the Defendants was so bad that it is the same as, or worse than, no treatment at all.

(19). From 6/18/96 to date, the following name medical staff/(Defendants) Ann Mobley, P. A. Fraink, Louise Cason, Kersey, Jacobs, Williams Benjamin, Ray, Padden, Anderson, Delgatta, Kandrick, and Fountain, observed Plaintiff in pain and the draging [*sic*] of their legs, the holing [*sic*] of the stomach and chest and ignored repeated indications of worsening condition and refused to do anything for them, Plaintiff are at this time in need of medical care and treatment, but are being denied of it by the above named Defendants.

(20). The following named officers/(Defendants): Deloach, Griffin, J. Sikes, Bargeron, Boyette, Collins, Pairreash, Hardwick, T. Moye, Lonnie Heidey, Mulling, Anthony Byard, Wash, ORouke, Jackson, Powell, Ruffin, Hughs, J. Powell, D. Cox and J. Wayne Garner's activities but fail to take corrective measures amounted to deliberate indifference and/or negligent.

(21.) Plaintiff do acquire a protected liberty interest in remaining in the general population, to which due process protection is attached. Also Georgia regulations governing the administration of state prisons created such an interest.

(22). No state may "deprive any person of life, liberty, or property, without due process of law". Liberty interests protected by the Fourteenth

Amendment may arise from two sources—the due process clause itself and the laws of the states.

(23). Plaintiff Goodman have been deprived of that interest without a hearing, governed by the procedures mandated in Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974).

(24). Plaintiff Goodman has a protected liberty interest in continuing to reside in the general prison population, at a medical prison.

(25). Prison officials (Defendants) actions in confining Plaintiff to administrative segregation violated Plaintiff's due process rights.

[EXHIBIT E]

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF GEORGIA
STATESBORO DIVISION

[Caption omitted in printing]

PLAINTIFF'S AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

(Filed: Oct. 21, 1999)

I, Tony Goodman, do declare under the penalty of perjury the information set forth herein below are true and corect [*sic*].

1.) I am the Plaintiff named in the above-styled case.

2.) I file this cause of action in good faith.

3.) I verily believe I am entitled to the redress herein.

4.) I do not enter and file this cause of action for any type of harassment and/or undue hardship and burdensome upon defendants.

5.) I state the named actions by defendants "set forth herein this cause of action did intelligently, understandingly, knowingly and voluntarily deprived and denied me certain rights, benefits, privileges and immunities secured and guaranteed to me by the United States Constitution and law thereof.

6.) I have been housed in a prison (G.S.P.) where the law library, church, gymnasium, and yard has no accessible toilet stalls, drinking fountain, sink, ramps or alarms, also the space allowance and reach ranges for

w/c persons inside of the bathrooms at the gymnasium, law library, church and yard is not w/c accessible.

7.) On the following dates: 6/22/96, 8/9/96, 8/20/96, 9/13/96, 11/23/96, 11/25/96, 7/31/97, 12/24/97, & 6/28/97, Due to the fact that (G.S.P.) Reidsville, GA. HCO-1) is not properly equipped to secure and stabilize and also house handicapped patients including Plaintiff Goodman, Plaintiff Goodman was trying to transfer from his w/c to the toilet and bed without the help of handicap bars and fell to the floor and was hurt.

8.) I have made requests after requests to Defendants and their agents to repair my personal w/c, in my requests I also relieved defendants of any and all responsibility associated with the repair or attempt to repair my w/c. Defendants and their agents refused to repair the w/c, which has caused Plaintiff to suffer physically, mentally and emotional pain.

9.) I am being discriminated against because of my disabilities, and this type of transfer was made to punish the Plaintiff, by the Defendants, for engaging in constitutionally protected activity. Defendants has impended danger against my life this was did in retation [*sic*] for utilizing the 42 U.S.C. § 1983 procedures.

* * * * *

12.) As a result of an automobile accident in 1992, Plaintiff is classified as a paraplegic and has been confined to a wheelchair due to a severe back injury.

13.) As a result of Defendants deliberate indifference and/or reckless disregard in operating the prison and Defendant's failure to properly house, secure and stabilize Plaintiff in a safe, manner, Plaintiff suffered multiple injuries including, but not limited to his head,

neck, back stomach, groin area, arm, legs, eyes, and has and continues to experience chronic headaches and significant trauma.

14.) As a proximate result of Defendant's acts, omissions, and deliberate indifference, Plaintiff has sustained, does sustain, and will continue to sustain personal injuries and mental and physical pain and suffering for which he entitled to be compensated.

I certify under penalty of perjury that the foregoing is true and correct. Executed on this 20th day of Mar., 1999.

/s/ TONY GOODMAN
TONY GOODMAN
EF #276619

WARDEN

ROM: DERWIN COX
(NAME)

JBJECT: Inmate Name: GOODMAN, TONY N

ne Above Named Inmate:(check one)
_____ (A) Is pending investigation relating to
Detention (PHD)
_____ (B) Is pending investigation of an incid
_____ (C) Is pending reassignment (PR)
_____ (D) Is admitted for alleged protective c
XXXXX (E) Other reason (specify): INF#8,
to GSP, per Mr. A.G. Thomas. Me

is this individual's decision based on all circumstance
opulation poses a serious threat to life, property, self,
"ution because (be specific): _____

his inmate's status will be reviewed daily by the Assist
eekends and holidays, the Administrative Duty Offica

ITIAL LOCK-UP APPROVED BY: _____
Signatu

ate: 6/18/96

:: Original to inmate file
Inmate concerned
OID (with incident report)
Asst. Warden/Security
Asst. Warden/Care & Treatment
Administrative Review Log Book

E: Unless authorized by the Warden or his designe
in Administrative Review.

All inmates in Administrative Review may retain
documented security reason why said property

VE REVIEW
ORDER

GSP PS 52

[EXHIBIT P-1]

DATE: 6/18/96

CRIEF COUNSELOR
(TITLE)

.: EF276619 Unit/Cellblock: IN6#8/ OTHER A&O

disciplinary report - Non Punitive Pre-Hearing

nt not related to a disciplinary report (PI)

tody reasons (PC)
THER A&O, inmate is in wheel chair, transferred
cial observation.

that this inmate's continued presence in the general
aff, other inmates, or to the security of the

nt Wardens of Security or Care and Treatment. On
will review daily.

e of Warden, Asst. Warden, Adm. Duty Officer

Unit Manager concerned
Duty Officer
Security Unit
J.H. Seckinger (Nathan copy) (2)
Administrative Assistant
Project Coordinator

, in writing, no inmate may stay longer than 3 days

heir personal property unless there exists a
hould not be retained.

EXHIBIT "P-1"

[EXHIBIT P-2]

Robert F. Proctor, M.D.
Staff Physician/ Internal Medicine
Georgia State Prison
HC01
Reidsville, GA 30453

DATE: 9/10/97

TO: Tony Goodman

RE: letter 9/5/97

Your concerns are well known and are being addressed by medication, and by consultation to experts in the relevent medical fields - Dr Maillous has already explained the consult plans in a recent reply to your letter to her - I'll remind you that PT is not available here; your security classification (which is not a medical responsibility) may make transfer unavailable - Consultation is our only option at present and this is going forward

R F Proctor MD

EXHIBIT F

[EXHIBIT P-3]

Carolyn A. Mailloux, M.D.
Medical Director
Georgia State Prison
HC01
Reidsville, GA 30453

Date: September 8, 1997

Name: Tony Goodman EF276619 Infirmary #8

Re: Letter

I have read your letters of 8-8-97 and 9-3-97, and have again reviewed your medical record. I found that in mid May 1996 there were two physician orders for you to receive physical therapy following an injury. The first was for ten days and the latter for seven days. I cannot find any order written for chronic therapy. However, in view of the persistant problems you have been experiencing with muscle spasms and headaches, I will write a consult to physical therapy at ASMP to see if they feel that chronic physical therapy would be of benefit to you. I have also requested that the neurosurgeon address the same question.

While in your letter you indicate that you feel that your medical needs are not addressed, review of your medical record reveals that you have been seen on sick call on average several times per week. Review also revealed that you have on a regular basis refused medication and treatment for your elevated blood pressure. It is difficult to provide treatment for your conditions when you refuse treatment. Please work with us, as I know you can, and together we can maximize your health and abilities.

Dr Mailloux

EXHIBIT [redacted] P-3

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF GEORGIA
STATESBORO DIVISION

Civil Action File: CV699-0012

TONY GOODMAN, PLAINTIFF

v.

STATE OF GEORGIA AND GEORGIA DEPARTMENT
OF CORRECTIONS, DEFENDANTS

DEFENDANTS' RESPONSE TO PLAINTIFF'S STATEMENT OF MATERIAL FACTS

COMES NOW the Defendants, by and through counsel, Thurbert E. Baker, Attorney General for the State of Georgia, and show the following as their response to Plaintiff's Statement of Material Facts:

(1). Denied as written.

(2). Denied.

(3). Denied.

(4). Admitted.

(5). Admitted.

(6). Denied.

(7). Denied.

(8). Denied as written.

(9). Denied.

(10). Denied.

(11). Denied as written. Plaintiff has not provided sufficient information so as to enable the Defendants to determine when the event allegedly occurred.

(12). Denied as written.

(13). The factual statements contained in Paragraph numbered thirteen (13) and sub-parts (A), (B), (C) and (D) are denied as written.

(14). Denied.

(15). Denied as written.

(16). Denied.

(17). It is admitted that Plaintiff has submitted numerous written requests and complaints to department employees regarding his medical care. It is denied that Plaintiff has been denied adequate medical care.

(18). Denied.

(19). Denied.

(20). Denied.

(21). Denied.

(22). Plaintiff states a legal argument and no response is required. However, it is denied that Plaintiff has been denied or deprived of any rights as guaranteed by State of Federal law.

(23). Plaintiff states a legal argument and no response is required. However, it is denied that Plaintiff has been denied or deprived of any rights as guaranteed by State or Federal law.

(24). Denied.

(25). Denied.

This 18th day of Nov., 1999.

Respectfully submitted,

THURBERT E. BAKER 033887
Attorney General

KATHLEEN M. PACIOUS 558555
Deputy Attorney General

JOHN C. JONES 401250
Senior Assistant Attorney General

/s/ STEPHEN E. CURRY
STEPHEN E. CURRY 202500
Special Assistant Attorney General

Augusta Riverfront Center
Suite 410, 1 Tenth Street
Augusta, Georgia 30901-1134
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UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF GEORGIA
STATESBORO DIVISION

[Caption omitted in printing]

DEFENDANTS' STATEMENT OF MATERIAL FACTS

(Filed: Nov. 18, 1999)

COME NOW the Defendants, by and through counsel, Thurbert E. Baker, Attorney General for the State of Georgia, and submit the following Statement of Material Facts to which no Genuine Issue Exists in support of their Motion for Summary Judgment in the above-styled case, as follows:

1. The Plaintiff, Tony Goodman, a felony inmate, is currently incarcerated at Macon State Medical Prison. At all times relevant to this lawsuit, he was assigned to Georgia State Prison in Reidsville, Georgia. The injunctive relief sought in the Plaintiff's Complaint was from conditions at GSP.

2. At all times relevant to this lawsuit, Plaintiff was in the care and custody of the Georgia Department of Corrections.

3. Plaintiff alleges that his assignment at Georgia State Prison was in violation of the Americans With Disabilities Act. He has since been reassigned, as he requested, to another prison.

4. Plaintiff was assigned to Georgia State Prison in the Special Management Unit both because of his continuous disruptive conduct and the special requirements associated with his being wheel chair bound.

5. Plaintiff is not a person subject to the Americans Disabilities Act.

6. As a matter of law, the Americans Disabilities Act does not apply to State correctional facilities.

7. Plaintiff has not experienced a serious injury as contemplated by the Prison Litigation Reform Act.

8. The Plaintiff was subjected to no limitation or condition at Georgia State Prison in violation of the Americans With Disabilities Act.

This 15th day of Nov. 1999.

Respectfully submitted,

THURBERT E. BAKER 033887
Attorney General

KATHLEEN M. PACIOUS 558555
Deputy Attorney General

JOHN C. JONES 401250
Senior Assistant Attorney General

/s/ STEPHEN E. CURRY
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(706) 724-0022

[EXHIBIT P-1]

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF GEORGIA
STATESBORO DIVISION

[Caption omitted in printing]

AFFIDAVIT OF PLAINTIFF TONY GOODMAN

(Filed: Dec. 2, 1999)

1.) Evidence in Plaintiff's action under American with Disabilities Act (ADA) established that any disability discrimination by defendants in excluding Plaintiff Goodman from certain prison programs and denying him benefits of certain services was intentional; Plaintiff had requested several times that he have access to programs and services, and defendants were aware they were not providing Plaintiff full or any access, knew that Plaintiff's disability was reason he was not receiving full access and that he repeatedly requested access, Defendants knew it had legal duty to provide Plaintiff Goodman with reasonable access. See *Love v. McBride*, N.D. Ind. 1995, 896 F. Supp. 808, affirmed 103 F.3d 558.

2.) Plaintiff whom are disabled, claim that defendants did not provide him with readily accessible bathroom and shower facilities. See applicable (ADA) regulations. Also, see *Sounders v. Horo*, E.D. Pa. 1996, 959 F. Supp. 689.

3.) Plaintiff Goodman is being denied use of state prison library, dining hall, education programs, gym, and church by Defendants, which are "activities," "programs and services," under ADA section conferring

rights on qualified disabled individuals/Plaintiffs who are denied access to services, programs, or activities of Public entity. See *Crawford v. Indiana* Dept. of Corrections, C.A. 7 (Ind.) 1997, 115 F.3d 481.

* * * * *

10.) The above named Defendants have discriminated against the Plaintiff because of his disabilities when they transffered [*sic*] him away from the medical prison and refused and/or denied and/or excluded him from participation in MH/MR services, P.T. services, etc. services, programs, and activities of the prisons.

* * * * *

14.) Plaintiff have made requests after requests to defendants for a copy of his prison medical records but, his requests were denied because he is indigent and do not have the funds to cover the cost for the copies. Plaintiffs is being deprived and denied access to the courts.

I certify under penalty of perjury that the foregoing is true and correct.

Executed on this 25th day of Nov., 1999.

/s/ TONY GOODMAN
TONY GOODMAN
EF #276619

[EXHIBIT P-9]

GEORGIA DEPARTMENT OF CORRECTIONS

MEDICAL CLINIC
(MD, PA, NP)

Name Goodman Irving
No. EF274419
Date of Birth 11/2/64
Race B Sex M

DATE/TIME: 6/2/98 INSTITUTION: GSP

SUBJECTIVE: PATIENT STATES: Transferred in paraplegia
OTHER SIGNIFICANT HEALTH CONDITIONS: States injured in auto accident 1992 - Lost Vision in Rt eye - Rt Retinal detachment - MRI of Brain Bulging disc C6-7 - Bulge D5-6 Compression fracture T1 - Bulge L4-5 Spinal -
OBJECTIVE: VITAL SIGNS: BP: 140/90 PR: 72 RR: 20 Temp: 98.6 Weight: 190
GENERAL: Alert NAD Hypertension Color Pale - Joint Limit Flexor Resp in - Int atrophy
CHEST: HEART: LUNGS:
OTHER SIGNIFICANT PHYSICAL FINDINGS: Visual R&R intact - No sensation Oriented - alert - spasm in all Rt wrists left

ASSESSMENT: DIAGNOSES: Para plegia - Hypertension - Foley Cath -

PLAN, ORDERS: REQUEST NEW DIAGNOSTIC TESTS:
REQUEST NEW CONSULTS:
ALL PREVIOUS MEDICATIONS SAME AS ON: as ordered EXCEPT: NEW MEDICATIONS:

REFERRED TO CHRONIC ILLNESS CLINIC: YES: (✓ NO: ( )
RETURN TO THIS CLINIC: YES: ( ) NO: (✓ IN: WEEKS: MONTHS:
EDUCATION: DISCUSSED WITH PATIENT FOLLOW-UP CARE: YES: ✓ NO:
DISCUSSED WITH PATIENT THE FOLLOWING ABNORMAL LAB:
DISCUSSED WITH PATIENT ALTERNATIVE THERAPIES SUCH AS: NA
DISCUSSED WITH PATIENT MEDICATION SIDE EFFECTS SUCH AS:
I CERTIFY I HAVE REVIEWED THE MEDICAL PROFILE.

SIGNED: [signature] P-9

PI-3005A (REV. 3/95) DO NOT WRITE ON BACK - ADDITIONAL SPACE: USE PI-3000 - BLACK INK ONLY MEDICAL CLINIC

[EXHIBIT P-12]

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF GEORGIA
STATESBORO DIVISION

[Caption omitted in printing]

DECLARATION IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, WHICH HE HAS NOT RECEIVED

(Filed: Dec. 2, 1999)

1.) I am the plaintiff in this case. I make this declaration in support of *my opposition to defendant's Motion for SUMMARY JUDGMENT.*

1A.) *I have not received a copy of Defendants Motion for Summary Judgment.*

2.) Pursuant to, the Eight and fourteen Amendments, and the safety and well being of the plaintiff, From 7/1/96, up until 11/19/99, the above named defendants and their agents has deliberate and intentionally denied and interfered with treatment and medication which has been prescribed by outside and inside doctors. The above named defendants have denied and refused to give the plaintiff his prescribed treatment and medication which caused him infliction of unnecessary pain and suffering. And with the fact, that this jail is not handicap excessble [*sic*], with regard to conditions of confinement in prisons the conditions must not inflict unrestricted and unnessary [*sic*] pain.

3.) The above named defendants and their agents must/but has refused to meet the medical needs of

disabled plaintiff and furnish the assistance that he require in order to live a minimally decent life in prison/jail. The defendants must/but have refused to take the plaintiff as they find him and provide facilities compatible with his physical condition that meet civilized standards of decency.

4.) The above named defendants and their agents have confined Plaintiff to a jail with which conditions has inflicted unrestricted and unnecessary pain, in which punitive conditions has greatly exceed the seriousness of the crime which brought on the imprisonment.

5.) The above named defendants and their agents have knowingly assigned Plaintiff to a cell that would aggravate serious medical ailment, and force bodily harm upon him, and further injury to his serious medical ailments is unnecessary and wanton infliction of pain.

6.) Plaintiff is being housed at a prison (of the D.O.C.) this jail is extensive overcrowded, and it affects environmental health and safety, food services, medical and mental health care, and programming.

* * * * *

8.) The space allowance and reach ranges for wheelchair persons inside of the bathrooms at the (prison) do not comply with (A.D.A. standers [*sic*]).

9.) The (prison) is not wheel chair accessible.

10.) The bathrooms at the (prison) do not have accessible routes.

11.) The (prison) do not have accessible wheel chair ramps, doors, entrances, drinking fountains and water

coolers, toilet stalls, shower stalls, toilet rooms, sinks or alarms.

12.) *The above named defendants and their agents has deliberate and intentiontionally [sic] denied and interfered with treatment and medication and also appointments which has been prescribed by outside and inside doctors.*

13.) *The above named defendants and their agents has observed plaintiff in pain and the holing [sic] of his neck and chest, and ignored repeated indications of worsening condition.*

14.) *Plaintiff has been forced to sleep in his wheel chair from 7/1/96, to 7/3/96 again from 3/23/98 to 5/29/98 which has caused his condition to worsen.*

15.) Plaintiff made request after request to the above named defendants and their agents for assistance transferring from his wheel chair to the toilet, shower, and bed but his requests was repeatedly denied.

16.) On 10/5/98, Plaintiff had B/M in his wheel chair and on the floor inside of the cell and was required to sit in his own waste, and denied of clean catheter, cleaning supplies, laundry service, and assistance *from 10/5/98 to 10/19/98.*

17.) The D.O.C. jails is an unmitigated disgrace.

18.) On 7/1/98, at approx. 5:00 am Plaintiff was trying to tranffer [*sic*] from his wheel chair to the toilet without any help or handicap bars and [fail] [*sic*] to the floor and was hurt at neck at right leg, and at the heard. [*sic*]

* * * * *

For the foregoing reasons, the Court should Grant Plaintiff's motion in all respects. Pursuant to 28 U.S.C. 1746 I declare under penalty of perjury that the foregoing is true and correct.

/s/ TONY GOODMAN
TONY GOODMAN
276619

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF GEORGIA
STATESBORO DIVISION

[Caption omitted in printing]

AFFIDAVIT OF TONY GOODMAN

(Filed: Feb. 25, 2000)

I can not participate in work assignments, recreational activities, entertainment, library, vocational training, dining hall, mental health services, congregate religious services, and occasional movements to areas other than a very confined area. These services and activities are available to inmates who do not have disabilities. Also, the cells in unit (k-1) are so narrow, I can not turn my wheel chair around inside of the cells.

I am being subjected to improper institutional segregation which is unlawful discrimination, Georgia has violated the law by not providing me with community alternatives, which is causing me to sink deeper into depression in the prison segregation unit, sitting idly in lonely cell in the locked ward. However, inmates with disabilities cannot participate in activities as inmates without disabilities because of the inaccessibility of the prisons, then Title II of the Americans With Disabilities Act is being violated.

Finally, windows are so high that inmates who use wheel chairs cannot look out of them, while I am uncertain what, if any, accommodation can assist an inmate to see the outside (or, if looking out a window is part of the adequate light required by standard operating procedure Reference No. II B09-0001 Section VI.E.1), this lack emphasizes the need to have an opportunity for

inmates who use wheel chairs to attend exercise sessions.

The medical administrator, Ms. L. Johnson/Waters, has a racial disparity concerning black/white inmates. She fills, [*sic*] that the INF cells are for white handicapped inmates, and the black handicapped inmates are to be housed in (k-1). Also, her action shows racial discrimination.

* * * * *

I am a general population close security inmate, who has disabilities and handicapped since 1992, and has suffered periods of depression. From 6/18/96, To: [*sic*] to date, I have been transferred to and from almost every prison here in the State of Ga., and segregated each time. This is a very shocking situation because, I (Goodman) who use a wheel chair, are kept in my cell 24 hours each day because of the inaccessibility of the prison.

I declare under penalty of perjury that the foregoing statement made in this affidavit are true and correct.

Executed on 2/19/2000

/s/ TONY GOODMAN
TONY GOODMAN
G.S.P.

[EXHIBIT L-4]

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF GEORGIA
STATESBORO DIVISION

[Caption omitted in printing]

PLAINTIFF'S DECLARATION IN SUPPORT OF HIS OPPOSITION TO DEFENDANT'S OUT-OF-TIME MOTION FOR SUMMARY JUDGMENT

(Filed: Nov. 1, 2001)

Tony Goodman, declares under penalty of perjury:

1. I am plaintiff in this case. The complaint alleges and show a pattern of discrimination by the States which violates the fourteenth Amendment. Plaintiff also, asserts these claims under the Americans with Disabilities Act, 42 U.S.C. § 12101, et seq. Because Goodman has no assets. I submit this declaration in support of my opposition to Defendant's out-of-time Motion for Summary judgment.

2. Plaintiff states that the State of Georgia, et al., violated the ADA by not providing him with reasonable accommodations regarding his disability and confinement to a wheelchair, Plaintiff states that he has been confined to a wheel chair since—1992 because of a back injury suffered in a accident. Plaintiff states that he was transferred to G.S.P. and while incarcerated there, Defendants failed to provide him with integrated services. Plaintiff asserts that he was confined to administrative segregation at G.S.P. and was denied accessibility to programs and services offered to similarly situated inmates.

3. Plaintiff states that the cell he was confined to lacked facilities for the disabled "for hygiene, drinking, and performing body excretion functions." Also, Plaintiff points out a lack of wheel chair accessibility to the prison law library, church, and gymnasium.

4. Plaintiff states that bathrooms, shower stalls, sinks, and entrances to building at GSP are not wheelchair accessible. As a result, plaintiff allegedly lacked access to services and activities offered by G.S.P. including counseling, education, vocational training, and recreation.

5. Additionally, Plaintiff that he requested, but did not receive, assistance from correctional officers in moving from his wheelchair to the toilet, shower, and bed. Plaintiff states that this lack of assistance caused him to have to sit in his own waste, to sleep in his wheelchair for long periods of time and to injure himself. In particular, plaintiff states that he was injured when "hurling" himself from the toilet to his wheelchair on August 26, 1998.

6. On 8/26/98, Mr. Smith was the unit (O.I.C.) k-unit, Mr. Harden was the unit officer (k-unit), Mr. S. Durden was the (E.R.) nurse.

7. On 8/26/98, when hurling myself from the toilet to my wheelchair fell to the floor was injured at knee, toe and spine,—officers Harden and Smith pick me up off the floor put me in my w/c, then officers Smith and Durden transported me by w/c, the prison (E.R.) where I was seen and exam, by Ms. Jackson, once I was seen and exam, Mr. S. Durden transported me back to my cell (k-1-8)–Please see *Exhibit "A"* attached hereto)

8. On 8/27/8, I was seen and exam by the (P.A.) an x-rays was taken of my right toe and right knee. Please see *Exhibit—"B, C and D"* attached hereto.

9. April 8, 1999. I fell when try to transfer from my w/c, to seat in the shower stall that was not designed for handicapped individuals, I was injured from the fall and was seen by a nurse Ms. S. Moke (AK) at that time I requested to be seen by a Dr. Ms. S. Moke refused to allow me to be seen by a Dr., at that time the officers put me back into my cell and lock the door.

9. On 6/15/99, transferred from *GSP* to Lee Arrendale State Prison where I was see and exam by D. J. Phillippe. Dr. Phillippe prescribed physical therapy, hoyerlift, trapeze bar flood mattress, wheel chair parts, lotions, soaps, and emoluments and hospital bed—which G.S.P. refused to do.

10. On 10/26/99, transfered [*sic*] from Lee Arrendale State Prison where I was see and exam. by Dr. Bassey. Dr. Bassey, also, prescribed physical therapy, hoyerlift, trapeze bar mattress, w/c parts, lotions, soaps, and emoluments and hospital bed. There also was an x-ray did of my t-spine, Dr. Bassey stated that the old fracture had been refractured—The Defendant at G.S.P. knew I needed the above named medical devices but refused to prescribe it.

11. For the reasons stated in the Declaration submitted herein, these undisputed facts establish that defendants violated the fourteenth Amendment and the ADA 42 U.S.C. §. Accordingly, the foregoing factual allegations create a genuine issue of material fact and will, If proved at trial, entitle me to judgment, as explained in the brief and in the declaration.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

10/29/01

/s/ TONY GOODMAN
TONY GOODMAN

(13)

No. 04-1236

Supreme Court, U.S.
FILED
JUL 29 2005
OFFICE OF THE CLERK

In The
Supreme Court of the United States

TONY GOODMAN,

Petitioner

v.

STATE OF GEORGIA, *et al.*

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF FOR PETITIONER GOODMAN

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July 29, 2005

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OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether, and to what extent, Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 *et seq.*, validly abrogates state sovereign immunity for suits by inmates with disabilities challenging discrimination by state-operated prisons.

PARTIES TO THE PROCEEDING

Petitioner Tony Goodman brought this civil action against the State of Georgia and the Georgia Department of Corrections, as well as J. Wayne Garner, A.G. Thomas, Johnny Sikes, J. Brady, O.T. Ray, H. Whimbly, Margaret Patterson, and R. King. The individual named defendants were sued in their personal and official capacities.

All the defendants participated as appellees in the United States Court of Appeals for the Eleventh Circuit. The United States intervened in the court of appeals, pursuant to 28 U.S.C. § 2403(a), to defend the constitutionality of the statute.

The United States and each of the defendants listed above are respondents in this Court pursuant to this Court's Rule 12.6, but the question presented herein has no application to the individual defendants sued in their personal capacities.

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OPINIONS BELOW

The opinion of the Eleventh Circuit (Pet. App. 1a-23a) is unreported. The district court's opinion granting summary judgment to the State on sovereign immunity grounds (Pet. App. 24a-28a) is also unreported.

JURISDICTION

The court of appeals entered its judgment on September 16, 2004, and denied a petition for rehearing *en banc* on December 9, 2004. Pet. App. 29a-30a. The petition for *certiorari* was filed on March 9, 2005, within 90 days of the latter date. This Court granted the petition on May 16, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Eighth, Eleventh and Fourteenth Amendments to the United States Constitution, and of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, are set forth in the appendix to the petition for *certiorari*. Pet. App. 31a-36a.

STATEMENT

A. Factual Background[1]

This case involves the State of Georgia's treatment of petitioner Tony Goodman at the Georgia State Prison

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[1] Because the district court entered summary judgment for the respondents on petitioner Goodman's claim under the Americans with Disabilities Act (Pet. App. 24a-27a), the material facts discussed in the text are drawn from the affidavits, declarations, and other documentary evidence submitted by the parties in the district court with "all justifiable inferences" drawn in favor of Goodman. *See Groh v. Ramirez*, 540 U.S. 551, 563 (2004) (internal quotation marks omitted).

(GSP) in Reidsville, Georgia, during Goodman's incarceration in that prison from 1996 to 1999, and from 2004 to the present. Pet. App. 2a, 20a. Goodman has had paraplegia since a 1992 automobile accident that injured his spinal cord; he uses a wheelchair to move about. J.A. 64-65 ¶¶15-16, 88 ¶12, 107 ¶2; *see id.* at 100 (Georgia Department of Corrections Medical Clinic form) (diagnosing Goodman as "paraplegic").[2]

The State has confined Goodman to a 12-foot by 3-foot cell for twenty-three to twenty-four hours each day because of the inaccessibility of other facilities in GSP. J.A. 64 ¶11, 67 ¶1, 71 ¶8, 106. The cell is too narrow to permit him to turn his wheelchair around. J.A. 60 ¶4, 71 ¶8. And because the bed in his cell is inaccessible, Goodman is often forced to sleep in his wheelchair or risk injury in transferring to his bed. J.A. 60 ¶3, 88 ¶7, 103 ¶14, 108 ¶5.

The State has not provided Goodman with accessible sanitary facilities. He has on a number of occasions experienced significant injuries (including broken bones) when he attempted to transfer from his wheelchair to the toilet in his cell. J.A. 59 (broke his left foot and crushed his left knee on May 14, 1999, trying to transfer to the toilet), 108-109 ¶¶6-8 (injured right knee on August 26, 1998), 103 ¶18 (injured his right leg and neck on July 1, 1998), 88 ¶7 (identifying dates in 1996 and 1997 where Goodman was injured trying to transfer from his wheelchair);

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[2] In their brief in opposition to the petition for *certiorari*, respondents attempted to cast doubt on petitioner's disability by referring to the events underlying his criminal conviction. Br. in Opp. 3 n.2. But petitioner's allegations of the substantial limitations in his ability to walk are supported not only by prison medical records and sworn affidavits discussed in the text, but also by respondents' own pleadings in the district court. *See* J.A. 96 ¶4 (Respondents' Statement of Material Facts) (explaining that petitioner was assigned to his housing unit because of "the special requirements associated with his being wheel chair bound").

see also id. at 63-64 ¶10 (bathrooms at prison library and church, as well as other areas of prison, do not comply with ADA standards). On other occasions, when Goodman was unable to reach the toilet, he was "required to live and sit in [his] own feces and other body waste" and was denied cleaning supplies and assistance in cleaning his wheelchair and cell. J.A. 65 ¶17; *see id.* at 59 (describing May 14, 1999 incident), 103 ¶16 (describing October 5, 1998 incident). In fact, Goodman was punished for not cleaning up the waste in his cell – the State confiscated his legal materials as a sanction. J.A. 59. Prison guards have repeatedly denied Goodman's requests that they assist him in transferring from his wheelchair to the toilet or bed. J.A. 103 ¶15, 108 ¶5.

Goodman was unable to take a shower "for more than two (2) years," because GSP's showers are inaccessible to wheelchair users. J.A. 60 ¶4, 67 ¶2. He has fallen and injured himself on multiple occasions when attempting to transfer from his wheelchair to a jury-rigged seat in the shower stall. J.A. 109 ¶9 (describing April 8, 1999 incident), 88 ¶7 (identifying dates in 1996 and 1997 where Goodman was injured trying to transfer from his wheelchair).

The inaccessibility of GSP's facilities has left Goodman without access to virtually any prison services, programs, and activities to which "other similar security [level] inmates have access." J.A. 65 ¶18. Goodman has been denied physical therapy services. J.A. 64-65 ¶15, 99 ¶10; *see id.* at 91 (letter from staff physician at GSP stating "PT is not available here"). He has also been denied access to the prison law library and "congregate religious services" that are "available to inmates who do not have disabilities." J.A. 105; *see also id.* at 98-99 ¶3, 108 ¶3, 65 ¶18 (denied "religious rights" to which "other similar security [level] inmates have access").

Numerous GSP officials, from the Warden and Deputy Warden to the line staff at the prison, are aware of these

problems and have done nothing to stop or solve them. J.A. 60, 98 ¶1. Moreover, prison staff ignored Goodman's repeated requests for medical care, J.A. 98 ¶1, refused to provide Goodman the treatment and medication prescribed by doctors, J.A. 101 ¶2, 103 ¶12, 109 ¶10, and refused to provide parts for or repair his wheelchair when it was broken, J.A. 88 ¶8.

B. Proceedings Below

1. In 1999, Goodman filed this suit *pro se* in the United States District Court for the Southern District of Georgia, against respondents the State of Georgia, the Georgia Department of Corrections, and a number of Georgia prison officials. Pet. App. at 3a, 20a. Goodman asserted two basic claims. First, invoking 42 U.S.C. § 1983, he alleged that respondents had violated his Eighth Amendment right to be free of cruel and unusual punishment. Pet. App. 3a. Second, he alleged that they had violated Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12131 *et seq.*, which prohibits States from discriminating against individuals with disabilities. Pet. App. 3a. Goodman sought monetary damages on both claims and injunctive relief on the ADA claim. *Ibid.*

Pursuant to a provision of the Prison Litigation Reform Act (PLRA) that imposes mandatory screening duties on district courts in prison cases, *see* 28 U.S.C. § 1915A, the district court, *sua sponte*, dismissed Goodman's Section 1983 claims against all respondents for failure to state a claim. Pet. App. 9a-10a. But the district court concluded that the complaint "arguably stated a colorable claim for relief" under Title II and permitted the ADA claim to proceed against the State of Georgia and the Georgia Department of Corrections. Pet. App. 10a.

The parties subsequently filed cross-motions for summary judgment on the ADA claim. Determining that there was a genuine issue of material fact regarding the

respondents' compliance with the ADA, the district court denied the motions. J.A. 22, 25. The district court also concluded that a disputed issue of material fact existed regarding whether Goodman was physically injured when he tried to transfer himself from his wheelchair to the toilet. J.A. 24. As a result, the applicability of the PLRA's prohibition on an inmate's recovery of damages for mental or emotional injury in the absence of a "physical injury," 42 U.S.C. § 1997e(e), could not be resolved on summary judgment. J.A. 24.

In October 2001, following this Court's decision in *Board of Trustees v. Garrett*, 531 U.S. 356 (2001), which held that Title I of the ADA (which bars disability-based discrimination in employment) could not validly abrogate state sovereign immunity, respondents filed a renewed motion for summary judgment. Pet. App. 12a. They contended that the Eleventh Amendment barred Goodman's claims insofar as he sought damages against the State and that Goodman's claim for injunctive relief had been rendered moot when he was transferred out of GSP in 1999. *Ibid.* The district court agreed and granted the motion. Pet. App. 24a-27a.

2. The Eleventh Circuit affirmed the district court's dismissal of the Title II claims against the State, but it reversed the district court on other grounds and permitted the Section 1983 claim and the Title II injunctive claim against the state officials to proceed. On the Section 1983 claim, the court of appeals held that Goodman's complaint stated a claim for a violation of the Eighth Amendment in three respects. First, by confining him to a cell in which he could not move his wheelchair, the individual respondents effectively imposed "some form of total restraint twenty-three to twenty-four hours-a-day without penal justification," in violation of the principles articulated in *Hope v. Pelzer*, 536 U.S. 730, 738 (2002). Pet. App. 18a. Second, by forcing Goodman "to sit in his own bodily waste because

prison officials refused to provide assistance," the individual respondents violated the principles articulated in a long line of Eighth Amendment cases that have "accord[ed] particular weight to exposure to human waste." Pet. App. 18a & n.10 (citing *McBride v. Deer*, 240 F.3d 1287, 1292 (10th Cir. 2001); *McCord v. Maggio*, 927 F.2d 844, 848 (5th Cir. 1991); *Fruit v. Norris*, 905 F.2d 1147, 1151 (8th Cir. 1990); *Johnson v. Pelker*, 891 F.2d 136, 139 (7th Cir. 1989); *La Reau v. MacDougall*, 473 F.2d 974, 978 (2d Cir. 1972), *cert. denied*, 414 U.S. 878 (1973)). Third, by "knowingly providing no physical therapy and inadequate medical treatment," by their "systematic denial of access to virtually all prison programs and activities because of [Goodman's] disability," and by providing "woefully inadequate and inhumane prison facilities for the disabled, such as toilets without the necessary support or handrails," the individual respondents showed "deliberate indifference" to Goodman's "serious medical condition." Pet. App. 18a-19a; *see Estelle v. Gamble*, 429 U.S. 97, 104-105 (1976).

On the ADA claim, the court of appeals sought additional briefing from the parties (including the United States, which intervened to defend the constitutionality of the statute) following this Court's decision in *Tennessee v. Lane*, 541 U.S. 509 (2004). Subsequent to that briefing, the court of appeals agreed with the district court that Goodman's claims against Georgia and the Georgia Department of Corrections were barred by the Eleventh Amendment. Pet. App. 19a.[3] The court of appeals relied (Pet. App. 19a) on its decision in *Miller v. King*, 384 F.3d 1248 (11th Cir.

[3] The court of appeals held that Goodman's claims for injunctive relief against state officials in their official capacities could proceed under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), and it reversed the district court's conclusion that Goodman's transfer out of GSP mooted the request for injunctive relief; Goodman had been transferred back to GSP while the appeal was pending. *See* Pet. App. 20a-21a.

2004), a case argued on the same day as Goodman's, in which the same three-judge panel had ruled that "Title II of the ADA, as applied in the Eighth-Amendment context to state prisons, fails to meet the requirement of proportionality and congruence" used to assess the validity of Fourteenth Amendment legislation. *Id.* at 1273, 1275 (citing *City of Boerne v. Flores*, 521 U.S. 507, 533 (1997)). Title II's abrogation of state sovereign immunity was thus not a valid exercise of Congress's enforcement authority under Section 5 of the Fourteenth Amendment in the view of the court of appeals – even in a case like *Miller* and the present case, where the plaintiff stated a claim that the conditions challenged under Title II also violated his constitutional rights. *See id.* at 1276 n.34.

SUMMARY OF ARGUMENT

I. As applied to discrimination against state inmates, Title II of the Americans with Disabilities Act is a congruent and proportional response to actual and threatened constitutional violations and therefore validly abrogates state sovereign immunity under Section 5 of the Fourteenth Amendment. *See City of Boerne v. Flores*, 521 U.S. 507, 518 (1997). This case is strikingly similar to *Tennessee v. Lane*, 541 U.S. 509 (2004), in which the Court upheld Title II as proper Section 5 legislation in the access-to-courts context. Indeed, the argument for upholding Title II is even stronger in the prison context. Each of the three factors this Court considered in *Lane* weighs heavily in favor of concluding that the statute is proper Section 5 legislation here.

First, in the prison context, as in the access-to-courts context, Title II enforces not only the Fourteenth Amendment's "prohibition on irrational disability discrimination" but also "other basic constitutional guarantees, infringements of which are subject to more searching judicial review" than rational-basis review. *Id.* at 522-523. As in

the access-to-courts context, the Constitution imposes on States "a number of affirmative obligations," *id.* at 532, in the prison context. This Court has repeatedly held that affirmative constitutional obligations arise from the State's total domination of an inmate's life. Prisons are places in which "the government exerts a degree of control unparalleled in civilian society," and inmates are "dependent on the government's permission and accommodation" to satisfy virtually all of their basic human needs. *Cutter v. Wilkinson*, 125 S. Ct. 2113, 2121-2122 (2005). As a consequence, the Eighth Amendment's prohibition against Cruel and Unusual Punishments, the Fourteenth Amendment's Due Process Clause, and other Bill of Rights guarantees all require that the State provide reasonable accommodations for inmates' disabilities in some circumstances.

Second, even more than in the access-to-courts context, Title II responds to a history "of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights." *Lane*, 541 U.S. at 524. *Lane* itself specifically recognized that the States' "pattern of unequal treatment" of individuals with disabilities extended to "the penal system." *Id.* at 525 & n.11. And the evidence before Congress during the two decades that it studied the problem demonstrated that state violations of the constitutional rights of inmates with disabilities were widespread. Far more than in *Lane*, a massive body of lower-court cases finding constitutional violations in this context provides "confirming judicial documentation," *Board of Trustees v. Garrett*, 531 U.S. 356, 376 (2001) (Kennedy, J., concurring), of that conclusion. Earlier statutes – including the Rehabilitation Act of 1973 and the Civil Rights of Institutionalized Persons Act of 1980 – failed to solve the problem of widespread violations of disabled inmates' constitutional rights. Because Congress "confronted a 'difficult and intractable proble[m],' where previous legislative attempts had failed," *Nevada Dep't of Human Resources v. Hibbs*,

538 U.S. 721, 737 (2003) (alteration in original) (citation omitted), Congress was within its constitutional authority to adopt "added prophylactic measures" to address the problem, *id.* at 731.

Third, as in the access-to-courts context, Title II is an "appropriate response" to this history and pattern of unequal treatment. *Lane*, 541 U.S. at 530. The statute targets conduct that has "a significant likelihood of being unconstitutional." *City of Boerne*, 521 U.S. at 532. Congress also carefully limited its intrusion into legitimate state prerogatives. The statute extends only to individuals with a "disability," *see* 42 U.S.C. §§ 12102(2), 12132, and inmates who satisfy that term's statutory definition are particularly likely to have "serious medical needs" that require accommodation under the Eighth Amendment and other constitutional provisions. *See, e.g.*, *Estelle v. Gamble*, 429 U.S. 97, 104-105 (1976). The statute's requirement of "reasonable modifications," 42 U.S.C. § 12131, takes account of the unique state interests in the prison context and further directs the statute at state conduct that is likely to be unconstitutional. And the limitations this Court has identified in Title II's damages remedy, as well as significant limitations imposed by the Prison Litigation Reform Act, also "tend to ensure Congress' means are proportionate to ends legitimate under § 5." *Hibbs*, 538 U.S. at 739 (internal quotation marks omitted). In light of the powerful record of state violations of the constitutional rights of inmates with disabilities, the same conclusion that the Court reached in the access-to-courts context is warranted here: Title II is "a reasonable prophylactic measure, reasonably targeted to a legitimate end." *Lane*, 541 U.S. at 533.

II. Even if this Court were not to agree that Title II is valid prophylactic Section 5 legislation in the prison context, the judgment of the court of appeals must nonetheless be reversed. The court of appeals concluded that

the same allegations that underlie Goodman's Title II claim also state a claim for a violation of the Eighth Amendment's Cruel and Unusual Punishments Clause. As applied to the facts of this case, then, the statute does nothing more than provide a remedy for an actual violation of Goodman's constitutional rights.

In *Lane*, 541 U.S. at 531 & n.19, this Court reaffirmed the principle that a statute must be upheld if Congress had the power to reach the fact setting addressed by the plaintiff's complaint – even if other applications of the statute might exceed Congress's power. The Court relied on *United States v. Raines*, 362 U.S. 17 (1960), which held that a statute challenged as exceeding Congress's Fifteenth Amendment enforcement power should be upheld "if the complaint here called for an application of the statute clearly constitutional." *Id.* at 24-25 (quoted in *Lane*, 541 U.S. at 531 n.19); *see also Griffin v. Breckenridge*, 403 U.S. 88, 104 (1966). This case is in the same posture as that of *Lane*, *Raines*, and *Griffin*. Whatever the outer boundaries of Title II's constitutionally permissible sweep may be, Congress plainly had Section 5 power to apply the statute here, where the State's conduct violated not just Title II but also the Constitution itself. *See City of Boerne*, 521 U.S. at 519-520 (Congress has power to provide remedies for actual constitutional violations).

ARGUMENT

There is no doubt that Congress intended to abrogate state sovereign immunity against suits asserting that a State violated Title II of the ADA. *See* 42 U.S.C. § 12202; *Tennessee v. Lane*, 541 U.S. 509, 518 (2004) (Section 12202 unequivocally expresses Congress's intent to abrogate state sovereign immunity against Title II suits). Nor is there any dispute that "Title II of the ADA unambiguously extends to state prison inmates." *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 213 (1998). This case presents only

the question whether Congress had the power to effectuate its abrogation.

This Court has repeatedly held that Congress may abrogate state sovereign immunity when it enacts legislation pursuant to Section 5 of the Fourteenth Amendment. *See Lane*, 541 U.S. at 518; *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). Congress specifically invoked its Section 5 power when it enacted the ADA. *See* 42 U.S.C. § 12101(b)(4) (invoking "the sweep of congressional authority, including the power to enforce the fourteenth amendment").

For the reasons described by the United States in *Lane*, Title II in all of its applications is a valid exercise of that power and petitioner Goodman urges reversal of the court of appeals' judgment on that ground. *See* Brief for the United States, *Tennessee v. Lane*, No. 02-1667. As in *Lane*, however, this Court can decide the case on a narrower ground. *See Lane*, 541 U.S. at 530-531. Title II readily qualifies as valid Section 5 legislation as applied to state discrimination against inmates with disabilities in the administration of the penal system.

I. TITLE II IS VALID SECTION 5 LEGISLATION AS APPLIED TO STATE DISCRIMINATION AGAINST INMATES WITH DISABILITIES

In *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997), this Court recognized that Section 5 authorizes Congress to adopt "[l]egislation which deters or remedies constitutional violations." The Court further held that valid Section 5 legislation may be prophylactic – it may "prohibit[] conduct which is not itself unconstitutional" – but "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 518, 520. Applying that test, this Court held in *Lane* that, at least insofar "as it applies to the class of cases implicating the accessibility of judicial

services," Title II "unquestionably is valid § 5 legislation." *Lane*, 541 U.S. at 531.

The same conclusion is warranted in the class of cases implicating the accessibility of prisons and discrimination against inmates with disabilities. Indeed, the argument for upholding Title II is even stronger in the context of incarceration. Prisons are places in which the State has near-total control over all aspects of an inmate's life on a twenty-four hour basis, including the very means for his existence through food and water, sanitation, and physical safety. The Constitution consequently imposes affirmative obligations on the jailer, including obligations to provide reasonable accommodations to inmates with disabilities. *Cf. Lane*, 541 U.S. at 532 (relying on similar "affirmative obligations" that the Constitution imposes on States in the access-to-courts context). States, however, have a long history of violating those constitutional requirements – a history that, more than in *Lane* or any other post-*Boerne* case, has been extensively documented by the federal courts. As the following sections demonstrate, Congress's enactment of Title II responded in a congruent and proportional manner to that intractable problem.

A. Title II Enforces Basic Constitutional Rights Retained By Inmates With Disabilities

The "first step" of the congruence and proportionality inquiry is "to identify the constitutional right or rights that Congress sought to enforce when it enacted Title II." *Lane*, 541 U.S. at 522. Title II prohibits States from discriminating against individuals with disabilities. 42 U.S.C. § 12132. As part of that prohibition, the statute requires States to make "reasonable modifications" to rules, policies, or practices, to remove "architectural, communications, or transportation barriers," and to provide "auxiliary aids and services" where those responses are necessary to avoid disability-based discrimination. *Id.* § 12131(2); *see also* 28

C.F.R. § 35.130(b)(7) ("A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.").

As the Court held in *Lane*, Title II enforces a number of constitutional rights. Those rights include the Equal Protection Clause's "prohibition on irrational disability discrimination," *Lane*, 541 U.S. at 522; *see City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 450 (1985), as well as "a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review." *Lane*, 541 U.S. at 522-523.

Attempting to distinguish *Lane*, however, the court of appeals held that the Constitution imposes only "markedly narrow" and "negative" duties on States in the prison context. *Miller*, 384 F.3d at 1274; *see* Pet. App. 19a (relying on *Miller*). But that is incorrect. State prisons are not like the employment context addressed in *Garrett*, 531 U.S. at 368, where "[i]f special accommodations for the disabled are to be required, they have to come from positive law." In the prison context, as in the access-to-courts context addressed in *Lane*, 541 U.S. at 532, the Constitution itself imposes on States "affirmative obligations" in their treatment of individuals with disabilities. Because Title II, as applied to the prison context, enforces constitutional obligations that demand "more searching judicial review" than does the prohibition on irrational discrimination at issue in the employment setting, *id.* at 522-523, Congress had broader leeway to craft a remedy here than it did in *Garrett*. *See Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 735-736 (2003).

1. Title II Enforces Those Constitutional Rights That Require Accommodation Of Inmates With Disabilities Because Of The State's Control Over The Inmate And His Environment

"In the prison context," the State's power over an individual "is at its apex." *Johnson v. California*, 125 S. Ct. 1141, 1150 (2005). Prisons are places in which "the government exerts a degree of control unparalleled in civilian society," control that leaves inmates "dependent on the government's permission and accommodation" to satisfy virtually all of their basic human needs. *Cutter v. Wilkinson*, 125 S. Ct. 2113, 2121-2122 (2005). Under this Court's longstanding precedents, the State's control over the inmate, and the inmate's correlative dependence, create affirmative constitutional obligations: "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 199-200 (1989).

One important source of affirmative State obligations in the prison setting is the Eighth Amendment's Cruel and Unusual Punishments Clause, which has been incorporated in the Fourteenth Amendment. *See Robinson v. California*, 370 U.S. 660, 666 (1962). The Eighth Amendment requires States to "provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must 'take reasonable measures to guarantee the safety of the inmates.'" *Farmer v. Brennan*, 511 U.S. 825, 832 (1994); *see also City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244 (1983) (inmates imprisoned in jails prior to conviction have "due process rights" that "are at least as great as the Eighth Amendment protections available to a convicted prisoner"). A State's refusal to

provide accommodation to inmates with disabilities often violates these constitutional obligations.

The refusal to accommodate an inmate's disability can constitute "deliberate indifference to serious medical needs" that violates the Eighth Amendment. *Estelle*, 429 U.S. at 104. As then-retired Justice Powell wrote while sitting by designation on the Fourth Circuit, prison officials violate *Estelle* when they "ignore the basic needs of a handicapped individual or postpone addressing those needs out of mere convenience or apathy." *La Faut v. Smith*, 834 F.2d 389, 394 (4th Cir. 1987). Courts have repeatedly applied these principles to hold that the Eighth Amendment requires prisons to reasonably accommodate disabled inmates in circumstances that resemble this case, where the requested accommodation relates to issues of basic mobility and access to hygienic facilities. *See* pp. 27-29, *infra*. They have applied the same principles to hold that the Eighth Amendment requires prisons to provide accommodations (such as sign-language interpreters) to enable disabled inmates to receive needed medical treatment. *See* pp. 29-31, *infra*.

The Eighth Amendment also requires accommodation of inmates' disabilities in other situations, such as housing and placement decisions. Because the State must "take reasonable measures for the prisoners' own safety," *Washington v. Harper*, 494 U.S. 210, 225 (1990), the Constitution requires it to accommodate the disabilities of inmates with mental illness who are suicidal[4] or whose conditions

[4] *See, e.g., Jacobs v. West Feliciana Sheriff's Dep't*, 228 F.3d 388, 395 (5th Cir. 2000) (placement of inmate who was a known suicide risk in a cell with "a significant blind spot and tie-off points" from which a person could hang herself constitutes deliberate indifference); *Partridge v. Two Unknown Police Officers*, 791 F.2d 1182, 1187 (5th Cir. 1986) (failure to take steps to prevent suicide may constitute deliberate indifference to serious medical needs).

will significantly deteriorate if they are assigned to particular housing units.[6] And the failure to accommodate disability in making housing decisions can constitute "deliberate indifference to inmate health or safety," *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (internal quotation marks omitted), that violates the State's Eighth Amendment duty to protect inmates against harm from other inmates, where a physical or mental disability makes an inmate especially vulnerable to abuse or assault by other inmates. *See, e.g.*, *Ruiz v. Estelle*, 503 F. Supp. 1265, 1344 (S.D. Tex. 1980) (inmates with mental retardation "are peculiarly in need of special protection from physical, emotional, sexual, and financial abuse at the hands of others"), *aff'd in relevant part*, 679 F.2d 1115 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983); 45 Fed. Reg. 37,630 (June 3, 1980) (analysis of regulations implementing Section 504 of the Rehabilitation Act of 1973) ("In making housing and program assignments, [correctional] officials must be mindful of the vulnerability of some handicapped inmates to physical and other abuse by other inmates.").

The State's complete control over the prison environment also entails the affirmative obligation to facilitate inmates' exercise of fundamental Bill of Rights guarantees that have been incorporated in the Fourteenth Amendment. "Prison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Turner v. Safley*, 482 U.S. 78, 84 (1987). For example, States must afford inmates "a reasonably adequate opportunity to

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[6] *See, e.g.*, *Madrid v. Gomez*, 889 F. Supp. 1146, 1265-1266 (N.D. Cal. 1995) (Eighth Amendment prohibits assigning, *inter alia*, people with mental illness, mental retardation, or brain damage to the Security Housing Unit (SHU); "[f]or these inmates, placing them in the SHU is the mental equivalent of putting an asthmatic in a place with little air to breathe" and is "'very likely' to render them psychotic or otherwise inflict a serious mental illness or seriously exacerbate an existing mental illness").

present claimed violations of fundamental constitutional rights to the courts," whether by providing "law libraries and legal assistance" or by offering other effective means to ensure access. *Lewis v. Casey*, 518 U.S. 343, 351-352 (1996). States must also afford inmates "reasonable opportunities" to exercise their religion. *Cruz v. Beto*, 405 U.S. 319, 322 n.2 (1972).

Judicial enforcement of these fundamental constitutional rights is limited in the prison setting by the Court's recognition of "the urgency of discipline, order, safety, and security in penal institutions." *Cutter*, 125 S. Ct. at 2123. As articulated by this Court in *Turner*, 482 U.S. at 89, "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *See Lewis*, 518 U.S. at 361; *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987). *Turner*'s reasonable-relation test does not apply to inmates' claims under the Eighth Amendment or the Equal Protection Clause. *See, e.g.*, *Johnson*, 125 S. Ct. at 1149-1150.[6] But even where it does apply, that reasonable-relation test does not eliminate the government's affirmative, judicially-enforceable obligations. To the contrary, *Turner* itself makes clear, in light of the State's complete control of an inmate's means of exercising his rights, that a State can be required to provide some "accommodation of the asserted constitutional right." 482 U.S. at 90; *see also Overton v. Bazzetta*, 539 U.S. 126, 135 (2003) (the absence of "alternative means of exercising the constitutional right" is evidence of unreasonableness); *O'Lone*, 482 U.S. at 350 ("the availability of accommodations is relevant to the reasonableness inquiry"). In cases like Goodman's,

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[6] *See also Wilkinson v. Austin*, 125 S. Ct. 2384, 2395 (2005) (applying three-factor test of *Mathews v. Eldridge*, 424 U.S. 319 (1976), rather than *Turner* test, to procedural due process claim in prison setting).

where the State's refusal to accommodate an inmate's disability prevents use of facilities such as the prison chapel and law library, Title II enforces these constitutional rights as well.

Finally, Title II enforces States' affirmative obligation, imposed by the Due Process Clause of the Fourteenth Amendment, to provide adequate procedures before "impos[ing] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life" or otherwise depriving the inmate of a protected liberty or property interest. *Sandin v. Conner*, 515 U.S. 472, 484 (1995). That procedural obligation applies when the State seeks to administer antipsychotic drugs without the inmate's consent, *see Harper*, 494 U.S. at 222, when the State seeks to transfer an inmate to a "supermax" facility or a psychiatric hospital, *see Wilkinson*, 125 S. Ct. at 2394-2395; *Vitek v. Jones*, 445 U.S. 480, 493 (1980), when the State seeks to revoke good-time credits earned by an inmate, *see Wolff v. McDonnell*, 418 U.S. 539, 556-557 (1974), and in other similar circumstances, *see, e.g.*, *Sandin*, 515 U.S. at 487 (suggesting that due process is required "where the State's action will inevitably affect the duration of [the inmate's] sentence").

In these circumstances, due process requires that the State provide the inmate notice and a meaningful opportunity to be heard and participate in the decision-making process. *See Wilkinson*, 125 S. Ct. at 2396; *Harper*, 494 U.S. at 235; *Vitek*, 445 U.S. at 494-496. Where an inmate's disability, such as an inability to hear, limits his opportunity to participate without accommodation, those principles require that the State accommodate the disability. *See Bonner v. Arizona Dep't of Corr.*, 714 F. Supp. 420, 425 (D. Ariz. 1989) (Due Process Clause requires that "deaf, mute, and vision-impaired inmate" receive an interpreter in disciplinary proceedings against him).

2. Title II Enforces Constitutional Rights That Prohibit Discrimination Against Inmates With Disabilities

Title II's prohibition of discrimination against inmates with disabilities also enforces their right to equal protection recognized in *Cleburne*, 473 U.S. at 450. This Court has recently emphasized that the Equal Protection Clause's prohibition on invidious discrimination "is not a right that need necessarily be compromised for the sake of proper prison administration" and thus applies fully in the prison context. *Johnson*, 125 S. Ct. at 1149.

Indeed, in the context of prisons, invidious discrimination against individuals with disabilities may violate not only the Equal Protection Clause, but other constitutional rights as well. Sometimes, discrimination takes the form of prison guards targeting inmates with disabilities for assault. *See* pp. 23, 32-33, *infra*. By prohibiting that discrimination, the statute enforces the Eighth Amendment's prohibition on using force "maliciously and sadistically to cause harm." *Hudson v. McMillian*, 503 U.S. 1, 7 (1992). In other instances, where prison officials may discriminate against inmates with disabilities in the provision of the basic necessities of life, such as food and shelter, *see* pp. 23-24, 27-28, *infra*, the statute's prohibition against such discrimination enforces the Eighth Amendment requirement that the State provide for an inmate's basic human needs. And sometimes, discrimination denies inmates with disabilities access to activities that are independently protected by other constitutional provisions such as religious services, quasi-judicial proceedings, and law libraries. *See* pp. 33-36, *infra*. By prohibiting that discrimination, the statute enforces the constitutional provisions (such as the First Amendment and the Due Process Clause) that guarantee access to those activities.

B. States Have Repeatedly Violated The Constitutional Rights Of Inmates With Disabilities

Whether Congress validly exercised its Section 5 power with respect to state prisons "is a question that 'must be judged with reference to the historical experience which it reflects.'" *Lane*, 541 U.S. at 523 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966)). Where Congress responds to a "history and pattern" of constitutional violations by States, *Garrett*, 531 U.S. at 368, its power to enact prophylactic legislation is at its strongest.

"The charge that a State has engaged in a pattern of unconstitutional discrimination against its citizens is a most serious one," *Hibbs*, 538 U.S. at 748 (Kennedy, J., dissenting), but here that charge is supported by far "more than conjecture." *Ibid.* The general pattern of state violations of the constitutional rights of individuals with disabilities over the last 40 years, *see Lane*, 541 U.S. at 524, is particularly pronounced in the prison context, where people with disabilities are legally disenfranchised and mistreatment occurs out of the public eye. *Lane* specifically recognized that the States had engaged in a "pattern of unequal treatment" of individuals with disabilities that extended to "the penal system." *Id.* at 525 & n.11 (citing *La Faut*, 834 F.2d at 394 (inmate with paraplegia denied accessible toilet facilities); *Schmidt v. Odell*, 64 F. Supp. 2d 1014 (D. Kan. 1999) (double amputee forced to crawl around the floor of jail); *Key v. Grayson*, 179 F.3d 996 (6th Cir. 1999) (deaf inmate denied access to sex offender program allegedly required for parole), *cert. denied*, 528 U.S. 1120 (2000)). Evidence presented to Congress demonstrated that state violations of disabled inmates' constitutional rights were widespread. And far more than in *Lane*, a massive body of case law involving inmates with disabilities provides "confirming judicial documentation" of extensive "patterns of constitutional

violations committed by the State." *Garrett*, 530 U.S. at 376 (Kennedy, J., concurring).

1. The Evidence Before Congress Revealed A Long History Of State Violations Of The Constitutional Rights Of Inmates With Disabilities

Congress considered the problem of state violations of the constitutional rights of inmates with disabilities for nearly two decades before it enacted the ADA. During that time, Congress adopted a number of laws to address that problem. First, Congress enacted Section 504 of the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 394. Several years later, it enacted the Civil Rights of Institutionalized Persons Act (CRIPA), Pub. L. No. 96-247, 94 Stat. 349 (1980). But despite those laws, and the availability of the general Section 1983 cause of action, inmates with disabilities continued to experience a "widespread and persisting deprivation of [their] constitutional rights." *City of Boerne*, 521 U.S. at 526.[7] In the prison

[7] The discussion that follows includes some examples of constitutional violations in nominally local jails, as well as many examples of constitutional violations in state prisons. As in *Lane*, 541 U.S. at 527 n.16, it is appropriate for the Court to consider that full record of constitutional violations in determining whether the application of Title II to discrimination against inmates with disabilities is congruent and proportional. Jails, like prisons, hold inmates who have been convicted of crimes following prosecutions brought in the name of the State, in state courts, for violations of laws enacted by the state legislature, although jail inmates usually serve shorter sentences than do prison inmates. Jails also hold inmates who have been denied bail pending criminal prosecution in state court or who have been remanded to state custody pending sentencing after conviction by state court. Like nominally local courts, nominally local jails are also frequently deemed to be "arms of the State" who "enjoy precisely the same immunity from unconsented suit as the States." *Ibid.*; *see, e.g.*, *Manders v. Lee*, 338 F.3d 1304, 1328 (11th Cir. 2003) (*en banc*) (county sheriff in Georgia "is an arm of the State, not Clinch County, in establishing use-of-force policy

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context specifically, Congress thus "confronted a 'difficult and intractable proble[m],' where previous legislative attempts had failed." *Hibbs*, 538 U.S. at 737 (citation omitted; quoting *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 88 (2000)). That problem demanded "powerful remedies," *Kimel*, 528 U.S. at 88, including "added prophylactic measures," *Hibbs*, 538 U.S. at 737.

By the time Congress enacted the ADA in 1990, it had long experience with the problem of state violations of the constitutional rights of inmates with disabilities. In 1971 and 1972, Congress first touched on the issues in a series of hearings that examined state prison conditions generally.[8]

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at the jail and in training and disciplining his deputies in that regard"), *cert. denied*, 540 U.S. 1107 (2004); *Lancaster v. Monroe County*, 116 F.3d 1419, 1429 (11th Cir. 1997) (county jailers in Alabama "are state officials entitled to Eleventh Amendment immunity when sued in their official capacities"); *see also Cromer v. Brown*, 88 F.3d 1315, 1332 (4th Cir. 1996) (sheriffs in South Carolina are arms of the State); *Wilkerson v. Hester*, 114 F. Supp. 2d 446, 464-465 (W.D.N.C. 2000) (sheriffs in North Carolina are arms of the State). Accordingly, as in *Lane*, it is appropriate for this Court to look to "conduct of county and city officials" as well as that of States in examining the validity of Congress's action. *Lane*, 541 U.S. at 527 n.16.

[8] *See, e.g., Corrections, Part VIII, Prisons, Prison Reform, and Prisoners' Rights: Michigan: Hearings Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 92d Cong., 2d Sess. 154 (1972) (reprinting judicial opinion discussing inmate with paralysis who could not take showers or use the sink in his cell and was denied a wash pan or basin); *id.* at 136 (same, finding failure to accommodate the dietary needs of inmates with diabetes); *id.* at 153 (same, finding failure to accommodate suicidal inmate's depression by moving him from unsafe cell; the inmate killed himself); *American Prisons in Turmoil: Hearings Before the House Select Comm. on Crime*, 92d Cong., 1st Sess. 249-250 (1971) ("[A] retarded prisoner just cannot cope with what he is faced with in a prison system as it now exists in Florida. There are some people in the prison system that have IQ's of 50, 55, and 60."); *id.* at 256 ("Those with deep-seated mental trouble are mingled in the general prison population to their own detriment and the rest of the prisoners.").

In the late 1970's, while considering the legislation that was ultimately enacted as CRIPA, Congress focused extensively on violations of disabled inmates' rights. Committee hearings on the bill uncovered a wide-ranging record of state violations of the constitutional rights of inmates with disabilities. Congress heard evidence of cases, similar to Goodman's, where the State denied a disabled inmate accommodations that were necessary for basic mobility, sanitary, or medical needs.[9] Congress also heard testimony that inmates with mental and physical disabilities were frequent targets of "[p]hysical abuse at the hands of officers and other inmates." *Civil Rights for Institutionalized Persons: Hearings on H.R. 2439 and H.R. 5791 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 240 (1977) [hereinafter *CRIPA House Hearings*] (testimony of Stanley Van Ness) ("mentally deficient" inmates as targets of such abuse).[10] And Congress heard of an instance where corrections officers fed inmates with psychiatric disabilities a non-nutritious

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[9] *See, e.g., Civil Rights of Institutionalized Persons: Hearings on S. 1393 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 639 (1977) [hereinafter *CRIPA 1977 Senate Hearings*] (testimony of Alvin Bronstein) (inmate who used a wheelchair was placed in a cell on the inaccessible second floor, which he had been unable to leave "for years"); *id.* at 1066 (months- or year-long delays in obtaining prosthetic devices); *id.* at 1067 (inmate with quadriplegia developed bedsores that became infested with maggots because of failure to bathe him and change his dressings); *ibid.* (inmate who had a stroke "was made to sit day after day on a wooden bench beside his bed so that the bed would be kept clean").

[10] *See also Civil Rights of the Institutionalized: Hearings on S. 10 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 474 (1979) [hereinafter *CRIPA 1979 Senate Hearings*] (statement of the National Prison Project) (victimization, including rape, of inmates with mental retardation); 126 Cong. Rec. S1860 (daily ed. Feb. 27, 1980) (statement of Sen. Bayh) ("gang rape situation of a paraplegic inmate").

"'stew' (containing no meats or vegetables)," that "did not contain the basic ingredients found in the stew served to other inmates"; when asked why, the officers responded that "mental cases don't know what they eat anyway." *CRIPA 1977 Senate Hearings*, *supra*, at 234 (statement of Dr. Bailus Walker, Jr.).

In addition, Congress heard extensive testimony – bolstered by the judgments of a number of federal courts – that States failed to provide constitutionally adequate mental health treatment to inmates with psychiatric disabilities. *See, e.g.*, *CRIPA House Hearings*, *supra*, at 293 (statement of Drew S. Days, III); *id.* at 316-317, 320-321 (judicial finding of unconstitutional treatment in Louisiana); *CRIPA 1977 Senate Hearings*, *supra*, at 121 (statement of the Mental Health Advocacy Project) (discussing inadequate psychiatric treatment in Los Angeles County Jail); *id.* at 569-570 (statement of the Prisoner Assistance Project) (discussing inadequate psychiatric treatment in Maryland prisons); *id.* at 1066-1067 (judicial finding of unconstitutional treatment in Alabama); *id.* at 1107 (judicial finding of unconstitutional treatment in Oklahoma); *CRIPA 1979 Senate Hearings*, *supra*, at 70 (Report of Task Panel on Legal and Ethical Issues of President's Commission on Mental Health); *id.* at 35 (statement of Drew S. Days, III) (discussing inadequate psychiatric treatment in Florida prisons).

On the basis of that and other testimony, Congress enacted CRIPA, which empowered the Attorney General to bring suits to enforce the constitutional rights of state inmates, in 1980. *See* 42 U.S.C. § 1997 *et seq.* But as Congress moved to consider the ADA, it confronted significant evidence that state violations of disabled inmates' constitutional rights continued. A 1983 Civil Rights Commission report that was considered prominently by Congress specifically listed "[i]nadequate treatment and rehabilitation programs in penal and juvenile facilities,"

"[i]nadequate ability to deal with physically handicapped accused persons and convicts (e.g., accessible jail cells and toilet facilities)" and "[a]buse of handicapped persons by other inmates" as among the discrimination problems faced by individuals with disabilities. U.S. Comm'n on Civil Rights, *Accommodating the Spectrum of Individual Abilities* 168 (1983); *cf. Lane*, 541 U.S. at 527 (relying on that Civil Rights Commission report).

In 1988, the chair of the House Subcommittee on Select Education and Civil Rights appointed the Task Force on the Rights and Empowerment of Americans with Disabilities to gather facts concerning the proposed ADA. *See* House Comm. on Educ. & Labor, *Legislative History of Pub. L. No. 101-336: The Americans with Disabilities Act* 300 (1990) [hereinafter "Leg. Hist."]. The Task Force heard a number of accounts of discrimination against inmates with disabilities. *See Lane*, 541 U.S. at 527 (relying on accounts of discrimination submitted to the Task Force). Many of those accounts related directly to state violations of the kinds of constitutional rights discussed above, pp. 14-18: subjecting inmates with developmental disabilities to longer prison terms and placing them in settings where they were especially vulnerable to abuse by fellow inmates;[11] denying medical and psychiatric treatment to inmates with disabilities;[12] and denying interpretive services to inmates with hearing impairments.[13]

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[11] *See* Lodging of the United States, *Board of Trustees v. Garrett*, No. 99-1240, at 1091 (New Mexico).

[12] *See id.* at 55 (Alaska) (jail denied medical treatment to inmate with disability); *id.* at 331 (Delaware) (denial of psychiatric care to juvenile and adult offenders).

[13] *See id.* at 572 (Illinois) (hearing-impaired jail inmates denied interpretive services); *id.* at 673 (Kansas) (deaf man held in jail and denied interpretive services); *id.* at 787 (Maryland) (deaf inmates lacked telecommunications devices for the deaf); *id.* at 1161 (North Carolina) (deaf person jailed without interpreter).

The congressional committees that considered the ADA heard additional evidence of violations of the constitutional rights of inmates with disabilities. The House Judiciary Committee report noted that "persons with epilepsy, and a variety of other disabilities," are often "deprived of medications while in jail, resulting in further seizures." Leg. Hist., *supra*, at 490; *see also id.* at 1080 (testimony of Ilona Durkin) (stating that "many adults with traumatic brain injury" are "jailed because of aberrant behavior" caused by their disability). Hearings on the bill included testimony that jail inmates with hearing impairments had been denied interpreters, so that they could not understand their rights, *see id.* at 1331 (testimony of Justin Dart), and that jail inmates with HIV had been unjustifiably isolated and humiliated by their jailers, *see id.* at 1005 (testimony of Belinda Mason) (inmate with HIV forced by officers to spend the night in a car in an open parking lot, attracting onlookers "staring and pointing at the man").

Based on all that evidence, developed over the course of two decades, Congress enacted the ADA in 1990. That statute included specific findings of widespread and persisting "discrimination against individuals with disabilities" in, *inter alia*, "public services" and "institutionalization." 42 U.S.C. § 12101(a)(2), (3). As the foregoing discussion demonstrates, Congress had ample basis for those findings.

2. A Massive Body Of Case Law Provides "Confirming Judicial Documentation" Of Extensive State Violations Of The Constitutional Rights Of Inmates With Disabilities

The evidence of unconstitutional treatment of inmates with disabilities is not limited to "unexamined, anecdotal accounts" of the sort the Court found insufficient in

Garrett, 531 U.S. at 370. Like the more general "pattern of unequal treatment" of individuals with disabilities that this Court described in *Lane*, 541 U.S. at 525, a long body of judicial decisions – beginning before the enactment of the ADA and extending to the present day – confirms that States have frequently violated the constitutional rights of inmates with disabilities. In literally dozens of cases, courts have made affirmative findings, reflected in final judgments issued in reported opinions, that States had violated the constitutional rights of inmates with disabilities. And in many other cases, ultimately resolved without reported opinion, courts have ruled that inmates with disabilities presented allegations or evidence of unconstitutional conduct sufficient to proceed with actions against state officials under 42 U.S.C. § 1983.

In short, unlike in any of this Court's other post-*Boerne* cases, a massive body of reported lower-court decisions documents "extensive litigation and discussion of the constitutional violations" in the prison setting. *Garrett*, 531 U.S. at 376 (Kennedy, J., concurring). That "confirming judicial documentation," *ibid.*, underscores the need for the prophylactic legislation enacted by Congress to protect the constitutional rights of inmates with disabilities.

Courts have repeatedly found that States violated the Eighth Amendment by failing to accommodate the basic mobility and sanitary needs of disabled inmates. In 1980, the United States District Court for the Southern District of Texas ruled, on the basis of an extensive record, that the Texas Department of Corrections violated the Eighth Amendment rights of inmates with physical disabilities by delaying the provision and maintenance of wheelchairs, hearing aids, and other assistive devices, by refusing to provide wheelchair-accessible cells, and by refusing to provide accessible toilet and shower facilities. *Ruiz*, 503 F. Supp. at 1340-1341. Numerous cases decided both

before and since the enactment of the ADA have found similar violations, often in circumstances that echo the facts of this case: confinement in cells that are not wheelchair-accessible, thus effectively preventing inmates with disabilities from leaving or moving around within their cells; and refusal to provide accessible hygienic facilities, resulting in injuries and unsanitary conditions for inmates with disabilities.[14]

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[14] *See, e.g.*, *Simmons v. Cook*, 154 F.3d 805, 807-808 (8th Cir. 1998) (confinement of inmates with paraplegia to wheelchair-inaccessible cells without accessible toilet violated Eighth Amendment); *Frost v. Agnos*, 152 F.3d 1124, 1128-1129 (9th Cir. 1998) (failure to provide accessible shower violated constitutional rights of pretrial detainee who because of his leg cast "fell and injured himself several times"); *Hicks v. Frey*, 992 F.2d 1450, 1457 (6th Cir. 1993) (placing inmate with paraplegia in an isolation cell "too small to accommodate his wheelchair," thereby denying mobility and access to a shower, violated Eighth Amendment); *Weeks v. Chaboudy*, 984 F.2d 185, 187 (6th Cir. 1993) (denial of wheelchair to inmate with paralysis, resulting in inmate's inability to shower himself or leave his cell, violated Eighth Amendment); *Johnson v. Hardin County*, 908 F.2d 1280, 1284 (6th Cir. 1990) (denial, *inter alia*, of crutches to inmate with a disability violated Eighth Amendment); *Leach v. Shelby County Sheriff*, 891 F.2d 1241, 1243-1244 (6th Cir. 1989) (several days' denial of appropriate mattress, bathing, and catheter supplies to inmate with paraplegia violated Eighth Amendment), *cert. denied*, 495 U.S. 932 (1990); *La Faut*, 834 F.2d at 394 (failure to provide appropriate toilet facilities and rehabilitation therapy to inmate with paraplegia violated Eighth Amendment); *Beckford v. Irvin*, 49 F. Supp. 2d 170, 180 (W.D.N.Y. 1999) (Eighth Amendment violation existed where inmate "was regularly deprived use of his wheelchair for extended periods of time, . . . was unable to shower, and . . . was not allowed to use a cup in order to try to bathe by taking water out of his cell toilet or drinking fountain"); *Casey v. Lewis*, 834 F. Supp. 1569, 1582 (D. Ariz. 1993) (lack of accessible bathrooms, showers, and cells violated Eighth Amendment); *see also Miller*, 384 F.3d at 1261-1263 (reversing grant of summary judgment to State prison official on Eighth Amendment claim of inmate with paraplegia who was "denied wheelchair repairs, physical therapy, medical consultations, and medical devices such as leg braces and orthopedic shoes," who was unable to move because his cell was too small to move his wheelchair and prison officials refused to remove his bed daily, and who

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Other Eighth Amendment cases have involved States' denial of essential medical care to inmates with disabilities. In a number of instances, courts have concluded that the medical treatment a State provided for particular disabilities was inadequate or simply nonexistent. Many of

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was denied accessible showers and toilets); *Bradley v. Puckett*, 157 F.3d 1022, 1025-1026 (5th Cir. 1998) (allegation that prison officials confined disabled inmate to lockdown cell with inaccessible shower facilities stated claim for violation of the Eighth Amendment); *Bryant v. Madigan*, 84 F.3d 246, 247 (7th Cir. 1996) (reversing grant of summary judgment to state prison officials on Eighth Amendment claim of inmate with quadriplegia who fell out of bed and broke his leg after prison refused to provide guardrails for his bed); *Cummings v. Roberts*, 628 F.2d 1065, 1068 (8th Cir. 1980) (jail inmate's allegation "that because the defendants failed to give him a wheelchair, he was forced to crawl on the floor" stated Eighth Amendment claim); *Allah v. Goord*, No. 04-6717, 2005 WL 1162333 at *5-*6 (S.D.N.Y. May 13, 2005) (inmate with paraplegia stated Eighth Amendment claim based on allegations that prison officials transported him in a van that did not accommodate his wheelchair, and that he was injured as a result); *Becker v. Oregon*, 170 F. Supp. 2d 1061, 1068 (D. Or. 2001) (allegation of denial of accessible shower to inmate with leg amputation states Eighth Amendment claim); *Hallett v. New York State Dep't of Corr. Servs.*, 109 F. Supp. 2d 190, 201 (S.D.N.Y. 2000) (inmate's allegation of five-month deprivation of a proper wheelchair stated claim under Eighth Amendment); *Taylor v. Plousis*, 101 F. Supp. 2d 255, 265-269 (D.N.J. 2000) (denying defendants' motion for summary judgment against claim that refusal to timely provide adequate prosthesis for dual-amputee inmate constituted deliberate indifference); *Roop v. Squadrito*, 70 F. Supp. 2d 868, 875-876 (N.D. Ind. 1999) (inmate with HIV overcame summary judgment on Eighth Amendment claim based on evidence that "he was forced to sleep on a mattress in a filthy cell, often times without access to drinking water or a flushable toilet; he was not allowed to interact with others because he was kept in isolation; and he was rousted from his sleep initially on the quarter hour and later on the hour"); *Candelaria v. Coughlin*, 787 F. Supp. 368, 378 (S.D.N.Y.) (allegations that inmate with paraplegia was denied an adequate wheelchair, orthopedic treatment, and liquid dietary supplement stated Eighth Amendment claim), *aff'd*, 979 F.2d 845 (2d Cir. 1992); *Young v. Harris*, 509 F. Supp. 1111, 1113 (S.D.N.Y. 1981) (allegation that prison refused to provide disabled inmate "with a leg brace that is necessary to enable him to walk without substantial difficulty" stated an Eighth Amendment claim).

these cases predate the ADA,[15] but the problem persisted even after the statute's enactment.[16] In other instances, States

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[15] *See, e.g.*, *Wellman v. Faulkner*, 715 F.2d 269, 272-273 (7th Cir. 1983) (denial of adequate psychiatric care to inmates with mental illness violated Eighth Amendment), *cert. denied*, 468 U.S. 1217 (1984); *Ramos v. Lamm*, 639 F.2d 559, 577-578 (10th Cir. 1980) (denial of adequate mental health care, resulting in suffering, suicides, and self-mutilation by inmates violated Eighth Amendment), *cert. denied*, 450 U.S. 1041 (1981); *Tillery v. Owens*, 719 F. Supp. 1256, 1302-1303 (W.D. Pa. 1989) (inadequate care of "serious mental illness" violated Eighth Amendment), *aff'd*, 907 F.2d 418 (3d Cir. 1990); *cert. denied*, 502 U.S. 927 (1991); *Casey v. Lewis*, 834 F. Supp. 1477, 1488-1491 nn.109, 123 (D. Ariz. 1993) (inadequate treatment of inmates with HIV); *Cody v. Hilliard*, 599 F. Supp. 1025, 1058-1059 (D.S.D. 1984) (denial of adequate mental health care to inmates with "serious psychiatric needs" violated Eighth Amendment), *rev'd on other grounds*, 830 F.2d 912 (8th Cir. 1987) (*en banc*), *cert. denied*, 485 U.S. 906 (1988); *Balla v. Idaho State Bd. of Corr.*, 595 F. Supp. 1558, 1569 (D. Idaho 1984) (State violated Eighth Amendment by providing "[l]ittle or no psychiatric care or assistance" to inmates with serious mental illnesses); *Ruiz*, 503 F. Supp. at 1346 (Eighth Amendment violation where "the right of physically handicapped inmates to minimal levels of medical care has been systematically ignored"); *Palmigiano v. Garrahy*, 443 F. Supp. 956, 975-976 (D.R.I. 1977) (inadequate mental health care in state prison violated Eighth Amendment), *remanded for further consideration on other grounds*, 599 F.2d 17 (1st Cir. 1979); *Mitchell v. Untreiner*, 421 F. Supp. 886, 891 (N.D. Fla. 1976) (Eighth Amendment violation where no psychological or psychiatric treatment available for inmates with mental illness); *Battle v. Anderson*, 376 F. Supp. 402, 415 (E.D. Okl. 1974) (inadequate mental health care in state prison violated Eighth Amendment); *Newman v. Alabama*, 349 F. Supp. 278, 284 (M.D. Ala. 1972) (Eighth Amendment violation where "the large majority of mentally disturbed inmates receive no treatment whatsoever."), *aff'd in relevant part*, 503 F.2d 1320 (5th Cir. 1974), *cert. denied*, 421 U.S. 948 (1975); *Talley v. Stephens*, 247 F. Supp. 683, 687 (E.D. Ark. 1965) (forcing inmates with "serious physical handicaps" to perform labor that they were physically unable to perform, and denying access to medical care, violated Eighth Amendment); *see also Maclin v. Freake*, 650 F.2d 885, 889 (7th Cir. 1981) (reversing grant of summary judgment to State prison official in case where inmate with paraplegia claimed that he had been denied any physical therapy for almost a year).

[16] *See, e.g.*, *Coleman v. Wilson*, 912 F. Supp. 1282, 1305-1319 (E.D. Cal. 1995) (denial of adequate mental health care to inmates with

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refused to provide accommodations such as interpreters during medical treatment that are essential to enable inmates with disabilities to receive appropriate and safe treatment.[17]

Other Eighth Amendment cases involve the failure to protect inmates with disabilities from physical harm. Courts have found that States have violated the Eighth Amendment by assigning inmates with disabilities to certain housing units where the conditions were likely to lead to

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severe psychiatric disabilities), *appeal dismissed*, 101 F.3d 705 (9th Cir. 1996); *Madrid*, 889 F. Supp. at 1226 ("Defendants' response to the lack of adequate mental health care – and particularly the response of defendant Gomez, who has overall responsibility for the California Department of Corrections – reflects a deplorable, and clearly conscious, disregard for the serious mental health needs of inmates."); *Casey*, 834 F. Supp. at 1547-1550 ("appalling" conditions for inmates with serious mental illnesses: "Rather than providing treatment for serious mental illnesses, ADOC punishes these inmates by locking them down in small, bare segregation cells for their actions that are the result of their mental illnesses. These inmates are left in segregation without mental health care."); *Arnold on Behalf of H.B. v. Lewis*, 803 F. Supp. 246, 256-257 (D. Ariz. 1992) (state provided "grossly inadequate mental health care" for inmate with psychiatric disability); *see also Rouse v. Plantier*, 182 F.3d 192, 199 (3d Cir. 1999) (concluding, in class-action challenge to conditions for inmates with diabetes, that "[b]ased on the evidence in the summary judgment record, there may be one or more subgroups of plaintiffs as to whom particular aspects of the care allegedly provided was not consistent with Eighth Amendment requirements"); *Flowers v. Bennett*, 135 F. Supp. 2d 1150, 1156 (N.D. Ala. 2000) (denying defendants' motion for summary judgment in case involving denial of insulin to inmate with diabetes); *D.M. v. Terhune*, 67 F. Supp. 2d 401 (D.N.J. 1999) (approving consent decree in challenge by inmates with mental disabilities to State's denial of mental health treatment); *McNally v. Prison Health Servs.*, 46 F. Supp. 2d 49, 53-57 (D. Me. 1999) (denying State's motion for summary judgment in case brought by inmate with HIV who was denied medication).

[17] *See, e.g., Clarkson v. Coughlin*, 898 F. Supp. 1019, 1043 (S.D.N.Y. 1995) (denial of interpretive services and assistive devices to deaf inmates during medical treatment violated Eighth Amendment).

significant deterioration of individuals with disabilities.[18] Courts have also concluded that States unconstitutionally failed to protect disabled inmates from attacks by other inmates,[19] and that they failed to take constitutionally required steps to prevent inmates with mental disabilities from committing suicide.[20] Unfortunately, in some instances,

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[18] *See, e.g.*, *Madrid*, 889 F. Supp. at 1266 (assignment of inmates with mental disabilities to SHU violated Eighth Amendment because that assignment was "'very likely' to render them psychotic or otherwise inflict a serious mental illness or seriously exacerbate an existing mental illness"); *Walker v. State*, 68 P.3d 872, 884 (Mont. 2003) (confinement of inmate with mental illness in conditions that "cause[d] serious mental illness to be greatly exacerbated" violated state constitutional counterpart to the Eighth Amendment); *see also Austin v. Wilkinson*, No. 01-71, 2002 WL 32828650 at *2 (N.D. Ohio, Apr. 5, 2002) (approving settlement that, *inter alia*, "stops the placement and retention of inmates at the OSP [a "super-max" facility] who are seriously mentally ill"); *Jones'El v. Berge*, 164 F. Supp. 2d 1096, 1118 (W.D. Wis. 2001) (granting, in Eighth Amendment case, preliminary injunction prohibiting assignment of seriously mentally ill inmates to Supermax prison based on evidence "that Supermax is not appropriate for seriously mentally ill inmates because of the isolation resulting from the physical layout, the inadequate level of staffing and the customs and policies"); *Langley v. Coughlin*, 715 F. Supp. 522, 540 (S.D.N.Y. 1989) (denying state officials' motion for summary judgment on Eighth Amendment claim based, *inter alia*, on "the failure to screen out from SHU those individuals who, by virtue of their mental condition, are likely to be severely and adversely affected by their placement there").

[19] *See, e.g.*, *Freeman v. Berry*, No. 87-0259, 1994 WL 760820 at *2-*3 (W.D. Ky. May 19, 1994) (deliberate indifference to risk of attacks by other inmates on inmate with HIV); *Ruiz*, 503 F. Supp. at 1346 (failure to protect inmates with mental retardation from abuse and physical harm by other inmates violated Eighth Amendment); *see also Taylor v. Michigan Dep't of Corr.*, 69 F.3d 76, 81-84 (6th Cir. 1995) (inmate with mental retardation who was raped after being transferred to prison where inmates were housed in 60-to-a-room barracks presented evidence sufficient to overcome summary judgment on his Eighth Amendment claim).

[20] *See, e.g.*, *Simmons v. City of Philadelphia*, 947 F.2d 1042 (3d Cir. 1991) (failure to take steps to prevent suicides by inmates with serious psychological needs violated Constitution), *cert. denied*, 503 U.S. 985

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prison guards themselves have even targeted disabled inmates for assault, in violation of the Eighth Amendment.[21]

The cases demonstrate that States have violated rights secured to inmates with disabilities by constitutional provisions other than the Eighth Amendment as well. States have denied due process by failing to accommodate inmates' disabilities in the course of disciplinary proceedings.[22] They have also engaged in intentional discrimination that has deprived inmates with disabilities of access to constitutionally protected activities, such as

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(1992); *see also Gibson v. County of Washoe*, 290 F.3d 1175, 1187-1193 (9th Cir. 2002) (reversing grant of summary judgment to defendant based on claim that defendant was deliberately indifferent to the serious medical needs of inmate with manic depressive disorder, resulting in his death), *cert. denied*, 537 U.S. 1106 (2003); *Jacobs*, 228 F.3d at 395 (denying motion to dismiss based on allegations that defendants were deliberately indifferent by placing inmate who was a known suicide risk in a cell with "a significant blind spot and tie-off points" from which a person could hang herself); *Viero v. Bufano*, 901 F. Supp. 1387, 1393-1394 (N.D. Ill. 1995) (allegations of failure to provide accommodations such as medication, counseling, and observation for inmate "with a history of severe psychological and psychosocial problems" stated claim for deliberate indifference to suicide risk).

[21] *See, e.g., Parrish v. Johnson*, 800 F.2d 600, 605 (6th Cir. 1986) (prison guard violated Eighth Amendment when he assaulted inmate with paraplegia, forced him to sit in his own feces, taunted him with a knife, extorted food from him, and verbally abused him); *Madrid*, 889 F. Supp. at 1166-1167 (inmate with mental illness suffered second- and third-degree burns over one-third of his body when corrections officers bathed him in scalding water); *see also Mullen v. Smith*, 738 F.2d 317, 318 (8th Cir. 1984) (*per curiam*) (inmate's allegation that prison officials forcibly removed him from his bed and ordered him to walk – after he had suffered a spinal injury that left him unable to walk – stated a claim for violation of the Eighth Amendment).

[22] *See, e.g., Ruiz*, 503 F. Supp. at 1344 (failure to provide assistance necessary to enable inmates with mental retardation to understand and participate in disciplinary proceedings violated Constitution); *see also Bonner*, 714 F. Supp. at 425-426 (denying State's motion for summary judgment where deaf inmate claimed that refusal to provide sign language interpreter in disciplinary hearings denied due process).

use of prison law libraries and participation in prison religious services.[23]

Review of reported decisions in ADA prison cases reveals that inmates with disabilities have invoked the statute to challenge state prison conditions that closely resemble those that courts have held unconstitutional. Inmates have challenged the denial of basic needs such as accessible cells and toilet and shower facilities.[24] They also

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[23] *See, e.g., Nolley v. County of Erie*, 776 F. Supp. 715, 740-742 (W.D.N.Y. 1991) (segregation of inmate with HIV deprived her of access to law library and religious services in violation of First Amendment).

[24] *See, e.g., Kiman v. New Hampshire Dep't of Corr.*, 301 F.3d 13, 15-16, 24-25 (1st Cir. 2002) (reversing sovereign-immunity dismissal in ADA claim brought by inmate with amyotrophic lateral sclerosis who was denied accessible shower and toilet facilities), *vacated*, 310 F.3d 785 (1st Cir. 2002) (*en banc*), *district court judgment aff'd by equally divided court*, 332 F.3d 29 (1st Cir. 2003) (*en banc*), *vacated and remanded*, 541 U.S. 1059 (2004); *St. Pierre v. McDaniel*, 172 F.3d 58 (9th Cir. 1999) (unpublished) (reversing grant of summary judgment to State prison officials in ADA case alleging that denial of crutches deprived inmate of access to, *inter alia*, showers and medical facilities); *Fennell v. Simmons*, 162 F.3d 1161 (6th Cir. 1998) (unpublished) (reversing grant of summary judgment, on qualified immunity grounds, in ADA case brought by inmate with paraplegia confined to inaccessible jail); *Hicks v. Armstrong*, 116 F. Supp. 2d 287, 289-290 (D. Conn. 1999) (denying motion to dismiss ADA claim brought by inmate with paraplegia who was denied, *inter alia*, accessible shower and toilet facilities); *Temples v. Crow*, No. 99-1147, 1999 WL 1053120 at *1-*2 (M.D. Fla., Oct. 20, 1999) (denying motion to dismiss ADA claim alleging denial of accessible transportation, toilet, and shower facilities to inmate who used wheelchair); *Cooper v. Weltner*, No. 97-3105, 1999 WL 1000503 at *5-*6 (D. Kan. Oct. 27, 1999) (denying defendants' motion for summary judgment in ADA case brought by inmate with disability denied accessible shower facilities); *Purcell v. Pennsylvania Dep't of Corr.*, No. 95-6720, 1998 WL 10236 at *4-*5 (E.D. Pa., Jan. 9, 1998) (denying State's motion for summary judgment in ADA case challenging denial of accessible cell and shower facilities); *Kaufman v. Carter*, 952 F. Supp. 520, 523-524 (W.D. Mich. 1996) (denying defendants' motion for summary judgment in ADA case brought by inmate with amputations on both legs who was denied accessible shower and toilet facilities, resulting in injury); *Harrelson v. Elmore County*, 859 F. Supp. 1465,

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have challenged the refusal to provide needed interpreters during medical appointments, disciplinary hearings against them, and other quasi-judicial proceedings concerning the terms or length of their confinement.[25] Inmates

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1466 (M.D. Ala. 1994) (addressing ADA claim of inmate with paraplegia "denied use of his wheelchair and forced to crawl around the cell" and "not provided with either toilet or shower facilities designed for disabled persons"); *Noland v. Wheatley*, 835 F. Supp. 476, 480-481 (N.D. Ind. 1993) (denying motion to dismiss ADA claim brought by semi-quadriplegic inmate who used wheelchair and was placed for three months in cell with "no bed or other furniture, no running water, and only an open drain in the floor for disposal of bodily waste," was given "no means of washing his hands or cleaning either his colostomy or urostomy bags after emptying them," and was given inadequate medical care); *Outlaw v. City of Dothan*, No. 92-A-1219-S, 1993 WL 735802 at *1-*2 (M.D. Ala., Apr. 27, 1993) (denying defendants' motion for summary judgment in ADA case alleging denial of accessible shower facilities).

[25] *See, e.g.*, *Armstrong v. Davis*, 275 F.3d 849, 857-858 (9th Cir. 2001) (affirming, in relevant part, injunction granted to plaintiffs in ADA case involving State's failure to provide accommodations necessary to enable individuals with disabilities to participate meaningfully in parole and parole revocation hearings), *cert. denied*, 537 U.S. 812 (2002); *Chisolm v. McManimon*, 275 F.3d 315, 326 (3d Cir. 2001) (reversing grant of summary judgment to defendants in ADA case brought by deaf inmate denied, *inter alia*, interpreter during intake and medical evaluation); *Randolph v. Rogers*, 170 F.3d 850, 858 (8th Cir. 1999) (finding disputed issues of material fact in ADA case alleging failure to provide interpreter to deaf inmate in disciplinary hearings and provision of medical care); *Duffy v. Riveland*, 98 F.3d 447, 450-452 (9th Cir. 1996) (reversing grant of summary judgment to defendants in ADA case brought by inmate with hearing impairment denied qualified interpreter at disciplinary and classification hearings); *Brown v. King County Dep't of Adult Corr.*, No. C97-1909W, 1998 WL 1120381 at *2 (W.D. Wash., Dec. 9, 1998) (denying defendants' motion for summary judgment in ADA case brought by deaf inmate who was denied interpreter during communications with medical staff); *Rewolinski v. Morgan*, 896 F. Supp. 879, 881 (E.D. Wis. 1995) (granting *in forma pauperis* status in ADA case brought by deaf inmate who was denied interpreter at disciplinary hearings and medical appointments).

also have brought ADA suits to challenge the exclusion of inmates with disabilities from constitutionally protected activities such as religious services and use of the law library.[26] That body of case law further underscores the important role that Title II of the ADA plays in preventing and providing a remedy for constitutional violations.

C. Title II Is A Congruent And Proportional Response To The History And Likelihood Of Violations Of The Constitutional Rights Of Inmates With Disabilities

In the prison context, as in the access-to-courts context addressed in *Lane*, Title II is "an appropriate response to this history and pattern of unequal treatment." *Lane*, 541 U.S. at 530. As the previous sections of this brief demonstrate, the State's unparalleled control over the lives of inmates creates certain affirmative constitutional obligations on the part of the State, including the obligation to provide some reasonable accommodations so that inmates can have meaningful access to the food, shelter, and medical care that the State must provide

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[26] *See, e.g.*, *Love v. Westville Corr. Center*, 103 F.3d 558, 558-559 (7th Cir. 1996) (affirming judgment for plaintiff in ADA case brought by inmate with quadriplegia who was denied access to "the prison's recreational facilities, its dining hall, the visitation facilities that were open to the general inmate population," denied ability "to participate in substance abuse, education, church, work, or transition programs available to members of the general inmate population," and given only limited access "to the law library, the regular library, and the commissary"); *Kruger v. Jenne*, 164 F. Supp. 2d 1330, 1332 (S.D. Fla. 2000) (denying motion to dismiss ADA claim brought by blind inmate who was denied accommodations including, *inter alia*, a cane and "talking books"; as a result, he could not access the law library or other parts of the jail, or participate in recreation); *Montez v. Romer*, 32 F. Supp. 2d 1235, 1237 (D. Colo. 1999) (class action alleging, *inter alia*, that denial of accommodations left inmates with disabilities "unable to use law libraries" and "medical clinics").

to those it incarcerates. And States have repeatedly violated those constitutional rights – even after Congress enacted other legislation to attempt to protect the rights of inmates with disabilities. When considered in the light of that background, the same conclusion the Court reached in the access-to-courts context is warranted here: In the prison context, as well, Title II is plainly "'responsive to, or designed to prevent, unconstitutional behavior.'" *Id.* at 533 (quoting *City of Boerne*, 521 U.S. at 532).

1. Title II Focuses On State Conduct That Poses A Significant Threat To Inmates' Constitutional Rights, While Limiting Its Intrusion On State Prerogatives

Given the circumstances in which the Constitution itself requires accommodation of inmates' disabilities, and the many occasions when States have violated the Constitution by failing to provide such accommodations, the conduct prohibited by Title II poses an obvious threat to constitutional rights. Frequently, the accommodations needed by inmates with disabilities are relatively inexpensive and easy to provide. Installation of a grab bar to permit Goodman to use the toilet in his cell would impose little burden on the State, for example. Nor would it impose any undue burden on the State to remove during the day a wheelchair-using inmate's bed from his cell to permit him to move around – the accommodation sought by the plaintiff in *Miller*, who is also incarcerated at GSP. *See Miller*, 384 F.3d at 1254. When a state prison denies such a reasonable accommodation to an inmate with a disability, the long record of constitutional violations against inmates with disabilities provided Congress a strong "reason to believe," *City of Boerne*, 521 U.S. at 532, that the failure to provide the accommodation reflects

deliberate indifference rather than a constitutionally legitimate state interest. The statute thus targets conduct that has "a significant likelihood of being unconstitutional." *Ibid.*

Not all of the conduct Title II prohibits in the prison context violates the Constitution. But to the extent that Title II proscribes such constitutional conduct in the prison context, it permissibly does so "in order to prevent and deter unconstitutional conduct." *Hibbs*, 538 U.S. at 728. The statute's added margin of protection serves to ensure that actual constitutional violations do not escape the law's sanction – as they predictably will, for example, in cases where inmates are unable to prove that the particular defendants had the subjective mental state required to make out a constitutional claim. *Cf. Farmer*, 511 U.S. at 837 (Eighth Amendment violation requires subjective deliberate indifference). An inmate's inability to establish that the defendant had the requisite mental state may often reflect the inherent inability of incarcerated persons to gather evidence about the mental states of those who confine them, rather than the absence of an underlying constitutional violation.

By imposing on States the duty to provide reasonable accommodations to inmates with disabilities without a showing of a particular prison official's mental state, Title II thus helps to ensure that constitutional violations do not go unremedied. In parallel circumstances, this Court has recognized that Section 5 gives Congress power to dispense with proof of the mental state required to establish a constitutional violation. *See Lane*, 541 U.S. at 520 ("When Congress seeks to remedy or prevent unconstitutional discrimination, § 5 authorizes it to enact prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent, to carry out the basic objectives of the Equal Protection Clause."); *Hibbs*, 538 U.S. at 736 (Congress may enact prophylactic rules to prevent and

provide a remedy for "subtle discrimination that may be difficult to detect on a case-by-case basis").

Moreover, a number of features of the ADA focus the statute on conduct that is particularly likely to reflect a violation of the constitutional rights of inmates with disabilities. One key means by which the statute targets constitutional violations in the prison context is its "disability" definition, which individuals must satisfy to be eligible for protection. *See* 42 U.S.C. § 12132. Under that definition, a plaintiff must show that he has (or is perceived by the State to have) a condition that imposes "substantial[]" limitations on "major life activities." *Id.* § 12102(2); *see, e.g.*, *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 565 (1999) (emphasizing "the fundamental statutory requirement that only impairments causing 'substantial limitat[ions]' in individuals' ability to perform major life activities constitute disabilities").

That statutory language, which this Court has "interpreted strictly to create a demanding standard for qualifying as disabled," *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 197 (2002), limits protection to individuals who are very likely to have the kind of "serious medical needs" that require accommodation under the Eighth Amendment, *Estelle*, 429 U.S. at 104, as well as those who are especially likely to need accommodation to exercise the rights guaranteed to them under the Bill of Rights and the Due Process Clause. Individuals who satisfy that definition are particularly likely to have conditions that have historically been targets of discrimination. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 494-495 (1999) (Ginsburg, J., concurring) (ADA's disability definition targets an "historically disadvantaged[] class").

The ADA's requirement of "reasonable modifications," 42 U.S.C. § 12131, also limits the reach of the statute to conduct that is likely to violate the Constitution. As this Court emphasized in *Lane*, 541 U.S. at 531-532, that

requirement demands that States provide only those modifications that are "reasonable" and that "would not fundamentally alter the nature of the service provided." *See* 28 C.F.R. § 35.130(b)(7) (requiring "reasonable modifications" except where "making the modifications would fundamentally alter the nature of the service, program, or activity"); *see also Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 603-606 (1999) (plurality opinion) (interpreting Title II's "fundamental alteration" defense).

Where architectural barriers are at issue, the statute imposes stringent standards of accessibility only on facilities built or altered after the statute's 1992 effective date. *See* 28 C.F.R. § 35.151. For "older facilities, for which structural change is likely to be more difficult," States may avail themselves of "a variety of less costly measures" so long as they ensure that the plaintiff has access to the facility's services, programs, and activities. *Lane*, 541 U.S. at 532 (citing 28 C.F.R. § 35.150(b)(1)); *see also Miller*, 384 F.3d at 1267 ("[P]risoner access to programs need not be universal because a public entity need not make structural changes in existing facilities where other methods are effective in achieving compliance with this section.") (internal quotation marks and brackets omitted). "And in no event is the [State] required to undertake measures that would impose an undue financial or administrative burden, threaten historic preservation interests, or effect a fundamental alteration in the nature of the service." *Lane*, 541 U.S. at 532 (citing 28 C.F.R. §§ 35.150(a)(2), (a)(3)). These same substantive standards govern the federal Bureau of Prisons, and have since 1978, *see* Pub. L. No. 95-602, 92 Stat. 2982 (1978) (codified at 29 U.S.C. § 794), and there is no indication that they have proven onerous or unworkable.

The lower courts have recognized that "[t]erms like 'reasonable' and 'undue' are relative to circumstances, and the circumstances of a prison are different from those of a

school, an office, or a factory." *Crawford v. Indiana Dep't of Corr.*, 115 F.3d 481, 487 (7th Cir. 1997) (Posner, J.). Accordingly, they have determined that the "reasonable modification" analysis in the prison setting must take account of "[s]ecurity concerns, safety concerns, and administrative exigencies." *Love*, 103 F.3d at 561; *see also Cutter*, 125 S. Ct. at 2123 (reading "compelling governmental interest" standard in the Religious Land Use and Institutionalized Persons Act as one that should be "applied in an appropriately balanced way" in the prison context, taking account of "the urgency of discipline, order, safety, and security in penal institutions"); *cf. Spector v. Norwegian Cruise Lines Ltd.*, 125 S. Ct. 2169, 2180-2181 (2005) (reading requirement of "readily achievable" barrier removal in Title III of the ADA, 42 U.S.C. § 12182(b)(2)(A)(iv), as one that, as applied to cruise ships, should take account of concerns about shipboard safety and compliance with international legal obligations).

In so ruling, the lower courts have focused the statute's prohibitions even more precisely on those acts that are particularly likely to violate the constitutional rights of inmates with disabilities. When a State fails to provide a disabled inmate with an accommodation that could reasonably be provided without sacrificing legitimate penological interests such as security concerns or administrative imperatives, there is a substantial likelihood that the State's action violates the Constitution. *See, e.g.*, *Turner*, 482 U.S. at 89-90 (holding that a prison regulation is generally valid if it is "reasonably related to legitimate penological interests," but recognizing that prisons may be required to provide some "accommodation of . . . asserted constitutional right[s]"); *Rhodes v. Chapman*, 452 U.S. 337, 356 (1981) (infliction of pain without penological purpose violates Eighth Amendment).

The law governing Title II's damages remedy limits the statute's impact on legitimate state operations as well.

Punitive damages are not available under the statute. *See Barnes v. Gorman*, 536 U.S. 181, 188 (2002). The Prison Litigation Reform Act (PLRA), Pub. L. No. 104-134, tit. VIII (1996), further limits the damages available in this context by prohibiting recovery "for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. § 1997e(e). As in *Hibbs*, 538 U.S. at 739-740, the limits on damages recoverable for violations of Title II "'tend to ensure Congress' means are proportionate to ends legitimate under § 5.'" *Id.* at 739 (internal quotation marks omitted; quoting *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 647 (1999)).

Other provisions of the PLRA provide further protection for state interests. The PLRA imposes a number of restrictions on suits brought by inmates, including Title II suits. *See generally Nelson v. Campbell*, 541 U.S. 637, 649 (2004) (describing restrictions the PLRA imposes on inmate litigation); *Crawford-El v. Britton*, 523 U.S. 574, 596 (1998) (same). Of greatest importance here, the PLRA: (1) requires plaintiffs to exhaust available administrative remedies before bringing suit challenging prison conditions and thus provides the State actual notice of the alleged discrimination and an opportunity to resolve the matter internally, *see* 42 U.S.C. § 1997e(a); *Porter v. Nussle*, 534 U.S. 516, 524-532 (2002); (2) requires a district court to screen and dismiss *on its own motion* any prison-conditions suit that "fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief," 42 U.S.C. § 1997e(c); *accord* 28 U.S.C. § 1915A; (3) requires inmates filing *in forma pauperis* to pay the full filing fee (albeit over time), 28 U.S.C. § 1915(b); (4) denies *in forma pauperis* status to any inmate who has on three previous occasions had an action or appeal "dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted," except in cases of

"imminent danger of serious physical injury," *id.* § 1915(g); and (5) limits prospective relief in prison-conditions cases, *see* 18 U.S.C. § 3626; *Miller v. French*, 530 U.S. 327, 347 (2000).

Title II's rights and remedies target conduct that is particularly likely to violate the constitutional rights of inmates with disabilities, while carefully limiting the statute's intrusion on state prerogatives. The statute, especially when taken together with the provisions of the PLRA, readily qualifies as "reasonably prophylactic legislation," *Kimel*, 528 U.S. at 88, in the prison context.

2. The Court Of Appeals Erred In Concluding That Title II Is A Disproportionate Remedy For State Inmates

The court of appeals ruled that Title II represents a disproportionate remedy in the prison context. The court reasoned that Title II cannot be justified as enforcing Eighth Amendment rights because it applies to a range of "prison services, programs, and activities not affected by the Eighth Amendment." *Miller*, 384 F.3d at 1274. The court's determination was doubly erroneous.

First, the court of appeals artificially limited its consideration to applications of Title II that implicate Eighth Amendment rights. But as this brief demonstrates above, pp. 16-19, the fundamental constitutional rights Title II enforces include the requirements of the Equal Protection and Due Process Clauses and various Bill of Rights protections that have been incorporated in the Fourteenth Amendment, as well as the rights guaranteed by the Eighth Amendment's Cruel and Unusual Punishments Clause. When considered in light of the extensive record of state violations of *all* of these rights, Title II's sweep can hardly be said to be excessive.

Second, and more important, the very nature of prophylactic legislation is to prohibit some conduct that does not violate the Constitution; such legislation does so in an effort to ensure that actual constitutional violations do not go undeterred or unremedied. This Court has repeatedly recognized that Congress may enact prophylactic legislation under Section 5: "Congress 'is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment,' and may prohibit 'a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text.'" *Lane*, 541 U.S. at 533 n.24 (quoting *Kimel*, 528 U.S. at 81); *accord City of Boerne*, 521 U.S. at 518. Given the significant constitutional obligations States assume in the treatment of disabled inmates within their custody, and the massive record of violations of those obligations, a statute that reaches conduct that is not in and of itself unconstitutional is plainly congruent and proportional. "Difficult and intractable problems often require powerful remedies," *Kimel*, 528 U.S. at 88, and the history discussed above affords ample justification for applying Title II to prisons, where the State exercises virtually complete control over the lives of inmates.[27]

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[27] Even if the court of appeals were correct in concluding that Congress lacked power to apply Title II to aspects of prison life that (unlike the facts here) may have little connection to the affirmative constitutional obligations the State has to inmates with disabilities, its judgment would still warrant reversal in this case. Congress clearly had a strong Section 5 basis for applying Title II to a significant "class of cases," *cf. Lane*, 541 U.S. at 530-531, arising in the prison setting, *i.e.*, cases (such as this one) in which disabled inmates challenge discrimination (or seek accommodation) relating to basic mobility, sanitary, or medical needs, access to law libraries and religious exercise, protection from harm and abuse, or participation in disciplinary proceedings. Regardless of the existence of any other aspects of prison life that might lack a strong enough connection to the State's affirmative constitutional obligations, in this class of cases, discrimination or denial of accommodation poses a powerful and obvious threat to constitutional rights, and

(Continued on following page)

Furthermore, if Title II is not upheld as valid Section 5 legislation in the prison context, there is a significant prospect that Congress will be powerless to protect inmates with disabilities. If the Court concludes that Congress lacked Section 5 power to apply Title II to the prison context, the statute will provide no basis for *any* relief – damages or an injunction, whether against the State or its officials under *Ex parte Young* – unless the statute can be upheld as an exercise of Congress's commerce power. But respondents argued vigorously in the district court that "the Commerce Clause does not authorize Congress to regulate state correctional facilities under the Americans with Disabilities Act." Dt. Ct. Dkt. 31 at 7. Respondents have never abandoned that contention, which *Miller* specifically left open. *See* 384 F.3d at 1268 n.23. Accordingly, the State's challenge to Title II in this case is one that goes to the basic constitutionality of Title II in the prison context, rather than simply to the statute's abrogation of state sovereign immunity.

II. EVEN IF TITLE II WERE NOT VALID PROPHYLACTIC LEGISLATION IN THE STATE PRISON CONTEXT, THE STATUTE IS VALID REMEDIAL SECTION 5 LEGISLATION AS APPLIED TO CASES WHERE THE STATE ACTUALLY VIOLATED A PLAINTIFF'S CONSTITUTIONAL RIGHTS

Even if the Court does not agree that Title II is valid prophylactic legislation in the prison context, the judgment of the court of appeals must nonetheless be reversed.

The court of appeals concluded that Goodman's allegations – which were supported by evidence submitted

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the minimal extent to which the statute goes beyond the Constitution is more than amply justified by the significant record of constitutional violations by States in similar cases.

in the record below – stated a claim for a violation of the Eighth Amendment's Cruel and Unusual Punishments Clause in three respects. First, the State's confinement of Goodman to a cell in which he could not move his wheelchair imposed "total restraint twenty-three to twenty-four hours-a-day without penal justification." Pet. App. 18a. Second, by "refus[ing] to provide assistance," prison officials forced Goodman "to sit in his own bodily waste." Pet. App. 18a & n.10. Third, the State showed deliberate indifference by "knowingly providing no physical therapy and inadequate medical treatment, systematic denial of access to virtually all prison programs and activities because of his disability, and woefully inadequate and inhumane prison facilities for the disabled, such as toilets without the necessary support or handrails." Pet. App. 18a-19a. Respondents have not challenged in this Court the Eleventh Circuit's conclusion that those allegations, if proven, would establish violations of the Eighth Amendment.

Those facts are the same facts that form the basis for Goodman's Title II claim. Yet the court of appeals concluded that Congress lacked Section 5 power to provide a remedy under Title II for those same facts.

In the view of the court of appeals, Title II cannot be valid under Section 5 as applied to *any* prison conditions case unless it is valid under Section 5 for *all* such cases. *See Miller*, 384 F.3d at 1276 n.34. In so ruling, the court of appeals misread *Lane*. The court began by correctly observing that, "under *Lane*, conduct does not need to be unconstitutional to be validly proscribed by Congress." *Miller*, 384 F.3d at 1276 n.34. *Lane* upheld Title II as applied to an entire class of cases, "without any mention of the ADA violations being *circumscribed* by or *limited* to what would otherwise constitute an actual constitutional violation." *Ibid.* (emphasis added).

From its correct initial observation, however, the court of appeals drew the incorrect conclusion that Section 5 analysis must invariably proceed on a "context by context" basis that does not look to the facts of individual cases. 384 F.3d at 1276 n.34. But Congress's prophylactic power to prohibit conduct that is constitutional does not undermine Congress's remedial power to reach cases in which the defendant's conduct actually violates the Constitution. To the contrary, *Lane* itself makes clear that Title II should be upheld as applied to a case where the statute provides a remedy for a constitutional violation. In *Lane*, 541 U.S. at 531 & n.19, this Court reaffirmed the principle that a statute must be upheld if Congress had power to reach the particular fact setting addressed by the complaint – even if other applications of the statute might exceed congressional power. *Lane* applied that principle to hold that, in determining the Section 5 basis for Title II, the Court need not consider the statute, "with its wide variety of applications, as an undifferentiated whole." *Id.* at 530. Instead, the Court held that it "need go no further" than to conclude that the statute could be upheld in the access-to-courts context of the case before it. *Id.* at 531.

Although *Lane* upheld Title II of the ADA as prophylactic legislation as applied to a "class of cases" that went beyond the facts of the particular case, the Court previously applied the same principle in two cases that considered only whether Congress had remedial power to reach the particular facts before it: *United States v. Raines*, 362 U.S. 17 (1960), and *Griffin v. Breckenridge*, 403 U.S. 88 (1966). In *Raines*, the Court rejected the defendants' constitutional challenge to a provision of the Civil Rights Act of 1957, 42 U.S.C. § 1971(c). The Court did not contest the lower court's conclusion that the statute might, by its terms, reach conduct that was outside of Congress's power to regulate under its Fifteenth Amendment enforcement

power. Instead, in language on which *Lane* specifically relied, the Court held that "if the complaint here called for an application of the statute clearly constitutional under the Fifteenth Amendment, that should have been an end to the question of constitutionality." *Raines*, 362 U.S. at 24-25, *quoted in Lane*, 541 U.S. at 531 n.19. Because the complaint alleged conduct that Congress clearly had the power to reach – race discrimination by state actors – this Court held that the district court should "have gone no further and should have upheld the Act as applied in the present action." *Id.* at 26.

Similarly, in *Griffin*, 403 U.S. at 104, the Court recognized that the broad prohibition of private conspiracies in 42 U.S.C. § 1985(3) might well have applications that went beyond Congress's powers to enforce the Reconstruction Amendments. But it noted that cases like *Raines* had "long since firmly rejected" the "rule that required invalidation of an entire statute if any part of it was unconstitutionally overbroad." *Griffin*, 403 U.S. at 104. Instead, the proper inquiry "need go only to identifying a source of congressional power to reach the private conspiracy alleged by the complaint *in this case*." *Ibid.* (emphasis added). Because Congress clearly had authority under the Thirteenth and Fourteenth Amendments to reach the conduct alleged in the case before it (a private conspiracy to attack an out-of-state vehicle belonging to an African-American who was believed to be a civil rights worker, *see id.* at 89-90), the Court found "no occasion . . . to trace out [the statute's] constitutionally permissible periphery." *Id.* at 107.

This case is in the same posture as that of *Lane*, *Raines*, and *Griffin*. Whatever the outer boundaries of Title II's constitutionally permissible sweep may be, Congress plainly had Section 5 power to apply the statute here, where the defendants' acts violated not just Title II

but also the Constitution itself. This Court emphasized in *City of Boerne* that Section 5 gives Congress power to provide remedies for actual constitutional violations. *See City of Boerne*, 521 U.S. at 519-520; *see also Lane*, 541 U.S. at 558-560 (Scalia, J., dissenting) (Congress has Section 5 power to provide remedies for actual Fourteenth Amendment violations). As applied to the facts alleged in Goodman's complaint, Title II does just that. By abrogating sovereign immunity, it gives Goodman a damages remedy against the State itself for the conduct that violated his constitutional rights. Absent such congressional action, Goodman could not sue the State for such unconstitutional conduct under 42 U.S.C. § 1983. *See* U.S. Const., Amdt. 11; *see also Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64-71 (1989). Instead, if he were to pursue his claims through a Section 1983 suit against the individual state officials who violated his rights, those officials who may be difficult to identify individually, may be judgment-proof, and would in any event be entitled to invoke the doctrine of qualified immunity. *See Anderson v. Creighton*, 483 U.S. 635, 638 (1987).

In short, as applied to the facts of this case Title II does nothing more than provide a remedy for an actual violation of Goodman's constitutional rights. Congress's authority to enforce the Cruel and Unusual Punishments Clause, as incorporated in the Fourteenth Amendment's Due Process Clause, thus plainly constitutes "a source of congressional power to reach the [facts] alleged by the complaint in this case." *Griffin*, 403 U.S. at 104. Even if Title II were not valid prophylactic legislation in the prison context, the court of appeals erred in ruling that the statute could not validly abrogate state sovereign immunity in this case.

The Court must, however, still address the validity of Title II as prophylactic legislation in the prison context. Unless Title II is sustained as valid Section 5 legislation

on that prophylactic ground, Goodman may lack an opportunity to obtain complete relief on his ADA claim because the courts below could conclude that Goodman has not established a violation of his constitutional rights. But if this Court ultimately were to conclude that Title II of the ADA is not valid prophylactic legislation in the prison context, the Court should make clear that Goodman may nonetheless continue to litigate his Title II claims so long as he can establish that the alleged statutory violations also violated his constitutional rights.

CONCLUSION

For the reasons set forth above, the judgment of the court of appeals should be reversed and the case remanded for further proceedings.

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v.
STATE OF GEORGIA, *et al.*,
Respondents.

TONY GOODMAN,
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v.
STATE OF GEORGIA, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR ADAPT; AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW; AMERICAN CIVIL LIBERTIES UNION; AMERICAN CIVIL LIBERTIES UNION OF GEORGIA; AMERICAN COUNCIL OF THE BLIND; AMERICAN DIABETES ASSOCIATION; AMERICAN PSYCHIATRIC ASSOCIATION; CENTER FOR HIV LAW AND POLICY; CITIZENS UNITED FOR REHABILITATION OF ERRANTS; HUMAN RIGHTS WATCH; LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.; THE LEGAL AID SOCIETY OF NEW YORK CITY; NATIONAL ASSOCIATION FOR RIGHTS PROTECTION AND ADVOCACY; NATIONAL ASSOCIATION OF THE DEAF; NATIONAL HEALTH LAW PROGRAM; NATIONAL MULTIPLE SCLEROSIS SOCIETY; NATIONAL SPINAL CORD INJURY ASSOCIATION; PRISON LEGAL NEWS; SOUTHERN POVERTY LAW CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI*[1]

Amici are nineteen professional organizations, civil liberties groups, prison-rights projects, and organizations that focus on improving the lives of individuals with disabilities, all of which recognize the essential role that Title II of the Americans with Disabilities Act ("ADA") plays in ameliorating the long history of state discrimination against prisoners with disabilities.

ADAPT is a national organization composed primarily of persons with severe physical disabilities, including persons with spina bifida, cerebral palsy, muscular dystrophy, spinal cord injuries, multiple sclerosis, quadriplegia, paraplegia, head and brain injuries, poliomyelitis, amyotrophic lateral sclerosis, sensory disabilities, and cognitive, mental and developmental disabilities. ADAPT has a long history and record of enforcing the civil rights of people with disabilities. ADAPT participated in the political and legislative process to pass the 1990 Americans With Disabilities Act, 42 U.S.C. § 12101 et seq.

The **American Academy of Psychiatry and The Law** was founded in 1969 and has approximately 2000 members. It is devoted to issues at the intersection of psychiatry and the law and has participated as amicus in several cases in this Court.

The **American Civil Liberties Union ("ACLU")** is a nationwide, nonprofit, nonpartisan organization with more than 400,000 members, dedicated to the principles of liberty and equality embodied in the Constitution and this nation's

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[1] The parties have consented to the submission of this brief. Their letters of consent have been lodged with the Clerk of this Court. None of the parties authored this brief in whole or in part, and no one other than *amici* or their counsel contributed money or services to the preparation or submission of this brief.

civil rights laws. Consistent with that mission, the National Prison Project of the ACLU Foundation was established in 1972 to protect and promote the civil and constitutional rights of prisoners. The **American Civil Liberties Union of Georgia** is one of the ACLU's state affiliates.

The **American Council of the Blind ("ACB")** is a national nonprofit, consumer organization of the blind, with seventy affiliates and members in all fifty states. Its mission is to improve the quality of life, equality of opportunity, and independence for all persons who are blind. To that end, ACB seeks to educate policy makers about the needs and capabilities of people who are blind, and to assist individuals and organizations wishing to advocate for programs and policies that meet the needs of people who are blind, or visually impaired. ACB members were very involved in the efforts that led to the passage of the ADA. Therefore, we are very disturbed about the legal challenges to its constitutionality which have been raised in recent years. We are especially concerned that state governments are increasingly taking up the cause of those who would weaken the ADA's effectiveness. We urge this Court to give careful consideration to the implications of such challenges for the rights and welfare of people with disabilities who live and work within those states.

The **American Diabetes Association ("ADA")** is the nation's leading nonprofit health organization providing diabetes research, information and advocacy. The mission of the organization is to prevent and cure diabetes, and to improve the lives of all people affected by diabetes. As part of its mission, ADA advocates for the rights of people with diabetes and supports strong public policies and laws to protect persons with diabetes against discrimination. ADA

has approximately 435,000 general members and nearly 18,000 health care professional members.

The **American Psychiatric Association**, with approximately 40,000 members, is the Nation's largest organization of physicians specializing in psychiatry. It has participated in numerous cases in this Court, including *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999). Its members have a strong interest in the constitutionality of the ADA as it bars government entities' discrimination against persons with disabilities, including persons with mental illnesses or disabilities.

The **Center for HIV Law and Policy**, an independent project of the National Center for Civic Innovation, is the country's first legal and policy resource bank and strategy center for advocates addressing HIV discrimination and the legal needs of those living with HIV. The central mission of the Center is to advance the just treatment of people affected by HIV by working to coordinate, improve and expand HIV advocacy and law reform efforts on their behalf, and to make this advocacy more responsive to their unaddressed needs. The availability of the ADA's remedies to state-sponsored disability-based discrimination is particularly important to people with HIV, who continue to suffer irrational, disparate treatment often inspired by fear of their disease, particularly in state correctional facilities that chronically have denied them essential services, access to basic programs afforded other inmates, and life-saving medical treatment.

Citizens United for Rehabilitation of Errants ("CURE") is a national prison reform organization with approximately 15,000 members, mostly comprised of prisoners and their families. Many of these prisoners have physical and mental disabilities. CURE's primary goals are (1) to limit the use prison to only those for whom it is absolutely necessary; and

(2) to advocate for the provision of rehabilitative opportunities to help prisoners improve their lives.

Human Rights Watch is a non-profit organization established in 1978 that investigates and reports on violations of fundamental human rights in over 70 countries worldwide, with the goal of securing the respect of these rights for all persons. It is the largest international human rights organization based in the United States. By exposing and calling attention to human rights abuses committed by state and non-state actors, Human Rights Watch seeks to bring international public opinion to bear upon offending governments and others and thus bring pressure on them to end abusive practices. In the United States, Human Rights Watch has addressed a range of human rights issues, including U.S. prison conditions. Human Rights Watch has filed amicus briefs before various bodies, including U.S. courts and international tribunals. The treatment of men and women incarcerated in U.S. jails and prisons has been a longstanding priority of Human Rights Watch, and is the subject of numerous Human Rights Watch reports.

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is a national non-profit organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and those with HIV through impact litigation, education and public policy work. Founded in 1973, Lambda Legal is the oldest and largest legal organization addressing these concerns. Since 1983, when it filed the nation's first AIDS discrimination case, Lambda Legal has appeared as counsel or amicus curiae in scores of cases in state and federal courts on behalf of people living with HIV or other disabilities.

The **Legal Aid Society of New York City** is a private organization that has provided free legal assistance to indigent persons in New York City for more than 125 years. Through its Prisoners' Rights Project, the Society seeks to ensure that prisoners are afforded full protection of their constitutional and statutory rights. The Society advocates on behalf of prisoners in New York City jails and New York state prisons, and where necessary conducts class action litigation on prison conditions, including litigation on behalf of prisoners with physical and mental disabilities.

The **National Association for Rights Protection and Advocacy ("NARPA")** includes recipients of mental health and developmental disabilities services; lay, professional, and self-advocates; family members; service providers; disability rights attorneys; and teachers at schools of law, social work, and public policy. It is dedicated to promoting the preferred options of people who have been labeled mentally disabled.

Established in 1880, the **National Association of the Deaf ("NAD")** is the nation's oldest and largest consumer-based, nonprofit organization promoting, protecting, and preserving the civil rights and quality of life of 28 million deaf and hard of hearing Americans. As a national federation of state association, organizational and corporate affiliates, the advocacy work of the NAD encompasses a broad spectrum of areas including, but not limited to, accessibility, education, employment, health care, mental health, rehabilitation, technology, telecommunications, and transportation. The NAD is committed to ensuring that deaf and hard of hearing individuals in the United States have equal access to the facilities and services of, and an equal opportunity to participate in all programs and activities of state and local governments, including prisons and correctional facilities. Removal of communication barriers by providing reasonable

accommodations, including auxiliary aids and services, is necessary to ensure access by individuals with sensory disabilities. The NAD is a private, nonprofit, non-stock, membership organization incorporated in the District of Columbia. The NAD has no parent corporation.

For more than thirty-five years, the **National Health Law Program ("NHeLP")** has engaged in legal and policy analysis on behalf of low income and working poor people, people with disabilities, the elderly, and children. NHeLP has provided legal representation and conducted research and policy analysis on issues affecting the health status and health access of these groups. As such, NHeLP has worked with the ADA, and the program's work and our clients will be significantly affected by the Court's decision in this case.

The **National Multiple Sclerosis Society** is dedicated to ending the devastating effects of multiple sclerosis. The Society supports more MS research and serves more people with MS than any national voluntary MS organization in the world. Through its 50-state network of chapters, the Society funds research, furthers education, advocates for people with disabilities, and provides a variety of empowering programs for approximately 400,000 Americans who have MS and their families. The Society believes that every individual has the fundamental right to lead a full, productive life via the support of laws that promote equality of opportunity for all citizens. The ADA has proven to be a major advancement in the public awareness of disability rights and has prompted substantial improvements in local disability regulations. The Society's participation here reflects its commitment to the right of every American to be free from discrimination and lack of independence under law.

The **National Spinal Cord Injury Association** is the nation's oldest and largest civilian organization dedicated to

helping the hundreds of thousands of Americans coping with the results of spinal cord injury and disease. Our mission is to enable people with spinal cord injuries and diseases to achieve their highest level of independence, health, and personal fulfillment by providing resources, services, and peer support. The ADA is a critical tool in helping individuals achieve those goals.

Prison Legal News ("PLN") is non-profit organization that advocates nationally on behalf of those imprisoned in American detention facilities. PLN publishes a magazine by the same name to educate its readers and the general public about the use of the civil justice system for the vindication of fundamental human and civil rights.

Founded in 1971 and located in Montgomery, Alabama, the **Southern Poverty Law Center** has litigated numerous civil rights cases on behalf of minorities, women, people with disabilities, and other victims of discrimination. Many of the Center's class actions have attacked unconscionable conditions of confinement in state prisons. Although the Center's work is concentrated in the South, its attorneys appear in courts throughout the country to ensure that all people receive equal and just treatment under federal and state law.

Many of *amici* have witnessed the extent of abuses against these prisoners as they have either litigated on their behalf or have worked to identify flaws in, and recommend solutions to, various penal systems' mistreatment of prisoners with disabilities. Based on their intimate familiarity with unconstitutional discrimination against prisoners with disabilities and their review of pertinent legislative history and judicial decisions, *amici* maintain that Title II of the ADA was a congruent and proportional response to what is, and continues to be, a pattern and

practice of unconstitutional discrimination in the prison context.

STATEMENT

This case involves a paraplegic state prisoner who was denied minimally decent and equal treatment as a direct result of his disability. The details are set forth in Petitioner's brief and need not be repeated here. It bears emphasis, however, that this kind of story is not an unusual one. To the contrary, persons with disabilities in state custody have been regularly discriminated against in ways that violate the Constitution. That reality was brought to Congress's attention when it enacted the ADA. This extensive empirical record of unconstitutional discrimination establishes that Title II of the ADA is a congruent and proportional response to state discrimination against prisoners with disabilities.

SUMMARY OF ARGUMENT

The gross and indefensible mistreatment alleged by Petitioner is no isolated incident. As the extensive legislative history and public record reflect, state prisons routinely discriminate against inmates with disabilities in violation of their basic constitutional rights. Such prisoners depend on state officials to meet their basic needs but often find themselves discriminatorily denied essential protection and services.

Congress, in determining the necessity of the ADA, was aware of the extensive record of state deprivations of the constitutional rights of incarcerated Americans with a broad range of physical and mental disabilities. To address this class of cases, among others, Congress expressly invoked the full sweep of its power to enforce the Fourteenth Amendment when it enacted Title II of the ADA, which was presented to the President only after Congress integrated decades of

analysis and experience, including repeated ineffective attempts to remedy states' systematic deprivation of rights guaranteed to the disabled by the Fourteenth Amendment and other constitutional provisions.

Based on this pattern of unconstitutional discrimination against prisoners with disabilities, a faithful application of *Tennessee v. Lane*, 541 U.S. 509 (2004), and *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), leads to the conclusion that Title II — as applied to prisoners with disabilities — permissibly enforces, rather than substantively redefines, the rights protected by the Fourteenth Amendment's Due Process and Equal Protection Clauses, and the First and Eighth Amendments, as applied to the states through the Fourteenth Amendment. Indeed, there exists a far more compelling historical predicate for abrogation of sovereign immunity vis-à-vis state discrimination against prisoners with disabilities than existed in *Lane*, or in *Hibbs* before it. Accompanied by the strong presumption of statutory validity, this historical record is dispositive in the case now before the Court.

ARGUMENT

I. THERE IS AN EXTENSIVE HISTORY OF UNCONSTITUTIONAL DISCRIMINATION AGAINST PRISONERS WITH DISABILITIES.

A. Evidence in the Legislative History

The legislative history of the ADA indicates that Congress was concerned with unconstitutional discrimination by states against prisoners with disabilities.[2] The House and

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[2] As demonstrated by the legislative history of the earlier Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997 *et seq*. (1980), Congress was well aware of the prevalence of state unconstitutional discrimination against prison inmates in general. *See* H.R. Rep. No. 95-1058, at 22 & n.54 (1978); S. Rep. No. 95-1056, at 16 (1978) ("[T]he basic

Senate Subcommittees "conclude[d] that there exists a compelling need to establish a clear and comprehensive Federal prohibition of discrimination on the basis of disability." S. Rep. No. 101-116, at 5 (1989); H.R. Rep. No. 101-485(II), at 28 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 310. The Subcommittees, in explaining the "need" for the ADA, relied on a U.S. Commission on Civil Rights report that identified discrimination in prisons as one of the "major social and legal mechanisms, practices, and settings in which handicap discrimination arises." U.S. Comm'n on Civil Rights, *Accommodating the Spectrum of Individual Abilities*, App. A at 165 (1983) (hereinafter "USCCR Rep."); *see also* S. Rep. No. 101-116, at 6; H.R. Rep. No. 101-485(II), at 28, *reprinted in* 1990 U.S.C.C.A.N. at 310 (citing USCCR Rep. at App. A at 168 (listing, *inter alia*, the "[i]nadequate treatment and rehabilitation programs in penal and juvenile facilities[,] [i]nadequate ability to deal with physically handicapped accused persons and convicts (e.g., accessible jail cells and toilet facilities) [and] [a]buse of handicapped persons by other inmates")).

The ADA's legislative history contains other references to discrimination against inmates with disabilities. S. Rep. No. 101-116, at 8; H.R. Rep. No. 101-485(II), at 31, *reprinted in* 1990 U.S.C.C.A.N. at 312 ("The [USCCR] recently concluded, with respect to people with disabilities, that: 'Despite some improvements . . . [discrimination] persists in such critical areas as . . . institutionalization . . . .'" (quoting USCCR Rep. at 159; alteration in original)); *see Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 211-12 (1998) (holding that Congress's reference to

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constitutional and Federal statutory rights of institutionalized persons are being violated on such a systematic and widespread basis to warrant the attention of the Federal Government." (quoting testimony of Drew S. Days, III, Assistant Att'y Gen.)).

institutionalization "can be thought to include penal institutions"). In hearings leading to the enactment of the ADA, Congress received extensive testimony regarding disability discrimination against inmates in state prisons. *See, e.g.*, S. Rep. No. 101-116, at 6; H.R. Rep. No. 101-485(II), at 28, *reprinted in* 1990 U.S.C.C.A.N. at 310 (citing USCCR Rep., App. A at 168); Cal. Att'y Gen., Comm'n on Disability, *Final Report* 103 (Dec. 1989) ("[A] parole agent sent a man who uses a wheelchair back to prison since he did not show up for his appointments even though he explained that he could not make the appointments because he was unable to get accessible transportation.").

Moreover, a congressionally designated Task Force submitted to Congress several thousand documents evidencing discrimination and segregation in the provision of public services, including in the treatment of persons with disabilities in prisons and jails. *See Board of Tr. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 391-424 (2001) (App. C to Justice Breyer's dissent); *id.* at 393 ("jail failed to provide person with disability medical treatment" (quoting Alaska at 55)); *id.* at 405 ("deaf people arrested and held in jail overnight without explanation because of failure to provide interpretive services" (quoting Illinois at 572)); *id.* at 409 ("public libraries, state prison, and other state offices lacked" telecommunications for the deaf (quoting Maryland at 787)); *id.* at 414 ("prisoners with developmental disabilities subjected to longer terms and abused by other prisoners in state correctional system" (quoting New Mexico at 1091)); *id.* at 415 ("police arrested and jailed deaf person without providing interpretive services" (quoting North Carolina at 1161)).

B. Evidence in the Public Record

In addition to the explicit legislative record of unconstitutional discrimination by states against prisoners

with disabilities, there is overwhelming evidence in the public record of a history of state violations of the constitutional rights of inmates in four specific contexts: Mobility Impairments, Physical Illnesses, Mental Illness, and Vision and Hearing Impairments.

1. Prisoners with Mobility Impairments

Eighth Amendment jurisprudence is replete with examples of states violating the basic constitutional rights of prisoners with mobility impairments. Indeed, prison officials frequently fail to attend to the basic life needs of prisoners with mobility impairments. *See, e.g.*, *LaFaut v. Smith*, 834 F.2d 389, 393-94 (4th Cir. 1987) (finding "deliberate indifference" on the part of prison officials in failing to provide rehabilitation therapy and toilet facilities to a paralyzed inmate who was required to drag his body across the floor to use the commode, which was not adequate to support him). As one court put it, the frequent denial of basic elements of adequate medical treatment for prisoners with mobility impairments "illustrate[s] the pervasive and gross neglect of prisoners' medical needs" in violation of the Eighth Amendment. *Newman v. Alabama*, 349 F. Supp. 278, 284 (D. Ala. 1972), *aff'd in relevant part*, 503 F.2d 1320 (5th Cir. 1974); *see id.* at 285 (finding systemic constitutional violations of prisoners' rights in the Alabama prison system including the death of a quadriplegic inmate, who spent many months in the hospital confined to a bed, leading to bedsores, which developed maggots from lack of care "until the stench pervaded the entire ward").

Other examples are legion. *See, e.g.*, *Simmons v. Cook*, 154 F.3d 805, 808 (8th Cir. 1998) (concluding that prison officials were deliberately indifferent to needs of paraplegic prisoner, whose food tray slot was wheelchair-inaccessible, and who could not use toilet); *Weeks v. Chaboudy*, 984 F.2d 185, 187 (6th Cir. 1993) (finding violation of Eighth

Amendment where paralyzed inmate was not permitted a wheelchair in his cell, not permitted to shower, and denied admission to the prison infirmary); *Leach v. Shelby County Sheriff*, 891 F.2d 1241, 1243 (6th Cir. 1989) (finding a policy or custom of deliberate indifference to serious medical needs of paraplegic inmates; evidence showed that, "[d]espite his medical need for cleanliness, [an inmate] was not bathed for several days," "was forced to remain for long periods of time in his own urine due to inadequate catheter supplies and was given inadequate aid for his bowel training needs despite his repeated requests for help"); *Parrish v. Johnson*, 800 F.2d 600, 603, 605 (6th Cir. 1986) (prison guard repeatedly assaulted paraplegic inmates with knife, forced them to sit in own feces, and taunted them with remarks like "crippled bastard" and "[you] should be dead"); *Beckford v. Irvin*, 49 F. Supp. 2d 170, 180 (W.D.N.Y. 1999) (finding Eighth Amendment violation where plaintiff was regularly deprived of his wheelchair for extended periods of time, unable to shower, and could not use a cup to attempt to bathe by taking water from his cell toilet or drinking fountain); *Yarbaugh v. Roach*, 736 F. Supp. 318, 320 (D.D.C. 1990) (finding violation of Eighth Amendment where prisoner debilitated by multiple sclerosis failed to receive adequate medical care for nearly a year).

Inmates with disabilities have also been denied accommodations such as wheelchairs or crutches, without which they are unable to perambulate and participate in prison programs, thus depriving the prisoners of fundamental constitutional liberties. *See, e.g., Love v. McBride*, 896 F. Supp. 808, 809-10 (N.D. Ind. 1995), *aff'd sub nom. Love v. Westville Corr. Ctr.*, 103 F.3d 558, 559 (7th Cir. 1996) (quadriplegic denied use of prison's facilities, unable to participate in substance abuse education, church or transition programs available to inmate population); *Johnson v. Hardin County*, 908 F.2d 1280, 1283-84 (6th Cir. 1990) (holding

jailers' refusal to provide crutches to inmate violated Eighth Amendment); *Cummings v. Roberts*, 628 F.2d 1065, 1068 (8th Cir. 1980) (holding jailer's denial of a wheelchair to a prisoner supports claim for cruel and unusual punishment); *Ruiz v. Estelle*, 503 F. Supp. 1265, 1340-44 (S.D. Tex. 1980) (finding inmates with mobility impairments denied access to virtually all programs and activities available to general population and concluding that the "total picture of physically handicapped inmates in TDC is one marked by the extreme indifference and inflexibility of prison officials"), *aff'd in relevant part*, 679 F.2d 1115 (5th Cir. 1982); *see also id.* at 1346 (opining that "only minor accommodations" would have avoided these constitutional difficulties, but that the state's "failure to make those minor adjustments needlessly subjects physically-handicapped prisoners to cruel and unusual punishment"). The number, magnitude and similarity of these cases — indicting the "care" prison officials provide — underscores the seriousness and pervasiveness of the ill-treatment of prisoners with mobility impairments.

2. Prisoners with Physical Illnesses

Diseases, both communicable and non-communicable, are considered disabilities under federal law. *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 284-86 (1987) (finding that teacher with susceptibility to tuberculosis qualified for protection under § 504 of the Rehabilitation Act of 1973);[3] *see* 28 C.F.R. § 35.104(Disability)(1)(ii) (defining "physical or mental impairment" under ADA to include "contagious and noncontagious diseases and conditions").

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[3] The ADA is interpreted consistent with and guided by the Rehabilitation Act. *See Bragdon v. Abbott*, 524 U.S. 624, 631-32 (1998) (concluding that 42 U.S.C. § 12201(a) "requires us to construe the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act"); 29 C.F.R. § 1630.1(c)(1).

This Court previously recognized that Congress's passage of laws prohibiting discrimination against individuals with disabilities reflected an understanding of the extensive history of discrimination against those with contagious illnesses. *Arline*, 480 U.S. at 284-85 ("The [Rehabilitation] Act is carefully structured to replace such reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments[.]"); *see also id.* at 284-86 & nn.11-15 (discussing Congress's concern with irrational discrimination against those with diseases).

The case law makes clear that Congress had ample basis for concluding that state prisons were discriminating against prisoners with various illnesses.[4] For example, prisoners who suffer from non-communicable, chronic conditions often suffer significant harm and disparate levels of restrictiveness as a consequence of denial of care and accommodations required by their disability. In one case, a state prisoner with Lou Gehrig's disease alleged that he was denied a cane needed for walking, a chair needed for showers, and a suitable toilet, as well as being improperly handcuffed. *Kiman v. N.H. Dep't of Corr.*, 301 F.3d 13, 15-16 (1st Cir. 2002), *withdrawn on other grounds*, 310 F.3d 785 (1st Cir. 2002); *see also Hunt v. Uphoff*, 199 F.3d 1220 (10th Cir. 1999) (finding violation of Eighth Amendment where inmate with diabetes was denied insulin, resulting in a heart attack and subsequent bypass surgery, resulting in his death from acute blockage of coronary artery graft); *cf. Howard v. City of Columbus*, 521 S.E.2d 51 (Ga. Ct. App. 1999) (finding

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[4] Accounts of discrimination against prisoners with physical illnesses have also been reported extensively in the news media. *See, e.g.*, Paul von Zielbauer, *As Health Care in Jails Goes Private, 10 Days Can Be A Death Sentence*, N.Y. Times, Feb. 27, 2005, at 1 (describing denial of basic health care and treatment protocols to inmates with physical illnesses, resulting in deaths of inmate with Parkinson's disease and inmate suffering from heart attack).

case appropriate for trial where inmate died of diabetes-related complications after officials failed to identify his diabetes, failed to provide any treatment or special diet to control his diabetes, and failed to adequately treat him when his high blood glucose levels caused him to become visibly ill).

Communicable diseases present another major challenge. The failure of prison officials to acknowledge and respond to inmates' serious medical conditions can result in forms of discrimination that not only violate the Eighth Amendment but implicate the ADA. For example, prison officials have engaged in a pattern of discrimination against prisoners who have HIV.[5]

In one typical case, a former prisoner brought suit challenging the prison's public identification of her HIV-positive status, its automatic segregation of HIV-positive inmates, and the denial of access to the law library and religious services based on HIV-positive status. *Nolley v. County of Erie*, 776 F. Supp. 715, 717-18 (W.D.N.Y. 1991). The court concluded that the prison's policy of identifying all HIV-positive prisoners by placing red stickers on their

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[5] Congress, in enacting the ADA, focused on HIV as an area of disability discrimination in need of a federal remedy. *See* S. Rep. No. 101-116, at 8; H.R. Rep. No. 101-485(II), at 31, *reprinted in* 1990 U.S.C.C.A.N. at 313 ("[T]he Commission concluded that discrimination against individuals with HIV infection is widespread and has serious repercussions for both the individual who experiences it and for this nation's efforts to control the epidemic.") (*Hearing Before the H. Subcomm. on Select Educ. and S. Subcomm. on the Handicapped*, 100th Cong. 40 (1988) (summarizing testimony of Adm. James Watkins, former chairperson of the President's Comm'n on the H.I.V. Epidemic)); 136 Cong. Rec. S9680, 9681 (daily ed. July 13, 1990) (statement of Sen. Kennedy) ("The ADA marks an important and compassionate step in this Nation's response to the HIV epidemic. The ADA will improve the quality of life for persons confronting AIDS.").

"documents and personal items" was "not reasonably related to legitimate penological interests" and a violation of the constitutional right to privacy. *Id.* at 732-33. The court also found that the prison's "policy of automatically segregating known HIV[-positive] inmates" without any review transgressed both the prisoner's constitutional right to privacy, *id.* at 734-36, and her due process rights. *Id.* at 738. Finally, the court held that the prison's denial of access to the law library violated the HIV-positive prisoner's right of access to the courts, *id.* at 741, and its denial of access to religious services abridged the inmate's First Amendment rights. *Id.* at 741-42.

Other courts have found similar constitutional violations by states against HIV-positive prisoners. *See, e.g.*, *Casey v. Lewis*, 834 F. Supp. 1477, 1488-91 & nn.109 & 123 (D. Ariz. 1993) (finding constitutional violations by prison system, in part, because of the treatment of HIV-positive prisoners); *Freeman v. Berry*, Civ. A No. C. 87-0259-L(A), 1994 WL 760820, at *2-*3 (W.D. Ky. July 20, 1994) (denying motion to alter judgment against state correctional official who was found to be deliberately indifferent, in violation of HIV-positive prisoner's constitutional rights, for refusing to transfer prisoner to ensure his safety); *cf. Roop v. Squadrito*, 70 F. Supp. 2d 868, 876-77 (N.D. Ind. 1999) (finding genuine issue of material fact existed regarding HIV-positive prisoner's claim for unconstitutional conditions of confinement); *Doe v. Coughlin*, 697 F. Supp. 1234, 1243 (N.D.N.Y. 1988) (preliminarily enjoining prison from involuntarily transferring HIV-positive prisoners).

In addition to adverse judgments, states have settled — or entered into consent decrees regarding — numerous suits by HIV-positive prisoners alleging constitutional violations. *See, e.g.*, *Austin v. Pa. Dep't of Corr.*, 876 F. Supp. 1437, 1453-54 (E.D. Pa. 1995) (approving class action settlement

between inmates and state prison system, which, *inter alia*, eliminated "unlawful discrimination against HIV-infected individuals" regarding work assignments and privacy of medical information); *see also Plata v. Davis*, 329 F.3d 1101, 1103 (9th Cir. 2003) (discussing the underlying settlement of original claims by female prisoners, including a sub-class of HIV-positive prisoners, who alleged violations of their constitutional rights); *Leatherwood v. Campbell*, No. CV-02-BE-2812-W (N.D. Ala. June 2, 2004), http://www.schr.org/prisonsjails/press%20releases/Magistrate%20Report%20Recommendation.pdf (approving settlement of class action brought by HIV-positive inmates against state correctional facility alleging violations of constitutional rights). *See generally* Anne-Marie Cusac, *"The Judge Gave Me Ten Years. He Didn't Sentence Me to Death": Inmates With HIV Deprived of Proper Care*, The Progressive, July 2000, at 22 (citing numerous cases brought by HIV-positive prisoners and relief granted by courts); Lawrence O. Gostin et al., *AIDS Litigation Project: A National Survey of Federal, State, & Local Cases Before Courts and Human Rights Commissions* 135-54 (1990) (listing cases); Theodore M. Hammett, et al., U.S. Dep't of Justice, *1996-1997 Update: HIV/AIDS, STD's, and TB in Correctional Facilities* at 93-97 (July 1999) (listing cases).

In sum, as these examples illustrate, Congress had an ample basis for concluding that prisoners with disabilities caused by various diseases had been subjected to harmful and discriminatory treatment.

3. Prisoners with Mental Illness

Prisons have frequently failed to accommodate the needs of prisoners with mental illness and frequently deny them basic and essential medical care, often leading to their exclusion from opportunities available to other prisoners. *See, e.g.*, *Casey*, 834 F. Supp. at 1550 ("The Court finds the

treatment of seriously mentally ill inmates to be appalling . . . . The Court considers this treatment of any human being to be inexcusable and cruel and unusual punishment in violation of the eighth amendment of the Constitution;" "[r]ather than providing treatment . . . [the prison] punishes these inmates by locking them down in small, bare segregation cells for their actions that are the result of their mental illnesses.").

Viewing only a small sample of the multitude of relevant cases is sufficient to reveal the extent of state discrimination against mentally ill prisoners. *See, e.g.*, *Vitek v. Jones*, 445 U.S. 480, 492-96 (1980) (affirming district court's conclusion that the state's policy of involuntarily transferring prisoners to mental health facilities implicated a liberty interest under the due process clause); *Carty v. Farrelly*, 957 F. Supp. 727, 738 (D.V.I. 1997) ("[I]nmates who demonstrate unusual behavior indicative of mental illness are not hospitalized for diagnosis; rather, they are sometimes separated into separate cell clusters or locked down into solitary confinement."); *Madrid v. Gomez*, 889 F. Supp. 1146, 1255-59 (N.D. Cal. 1995) (prisoner with mental illness who smeared feces was placed in scalding water until his skin peeled off and hung in large clumps around his legs); *Coleman v. Wilson*, 912 F. Supp. 1282 (E.D. Cal. 1995) (remedying excessive use of physical restraints with prisoners with mental illness); *Inmates of Occoquan v. Barry*, 717 F. Supp. 854, 863-64, 867 (D.D.C. 1989) (mentally ill inmates housed in cell block used for administrative and punitive segregation, where they were "locked in their cells for 23 hours a day with no social contact and . . . receive[d] no treatment except for medication"); *Newman v. Alabama*, 349 F. Supp. at 284 (prisoners with mental illness who acted violently were "removed to lockup cells . . . not equipped with restraints or padding . . . where they [were left] unattended"); *see generally* Human Rights Watch, *Ill-Equipped: U.S. Prisons and Offenders with Mental Illness*

34-37, 46-48 (2003) (collecting cases describing unique and systemic abuse of prisoners with mental illness by prisons).

The problem also extends to the population of prisoners with mental retardation and other developmental disabilities. For example, California "admitted violating the [ADA] and the U.S. Constitution's ban on cruel and unusual punishment, and agreed to create special programs for the estimated 5,000 prisoners with mental retardation, autism, cerebral palsy and other developmental disabilities." Reynolds Holding, *State Prisons Settle Disability Bias Lawsuit*, S.F. Chron., Aug. 12, 1998, at A20; *see also id.* (noting numerous instances of abuse of inmates with developmental disabilities by guards and other prisoners).

Similarly, in *Ruiz v. Estelle*, 503 F. Supp. 1265 (S.D. Tex. 1980), the court found the Texas Department of Corrections ("TDC") "failed to meet its constitutional obligation to provide minimally adequate conditions of incarceration for mentally retarded inmates." *Ruiz*, 503 F. Supp. at 1346. Of significance to the court was the fact that TDC refused to provide counsel or counsel substitute to assist mentally retarded inmates during disciplinary hearings. *Id.* at 1344. These prisoners with mental disabilities had an "inherent inclination to plead guilty" and they "serve[d] longer sentences than [other] inmates." *Id.* The TDC's systematic denial of counsel was found to violate the due process clause. *Id.* at 1346 (citing *Wolff v. McDonnell*, 418 U.S. 539, 570 (1974)).

4. Prisoners with Vision and Hearing Impairments

States frequently violate the constitutional rights of prisoners with vision and hearing disabilities and Congress was undoubtedly aware of the plight of these inmates. *See Garrett*, 531 U.S. at 405 (Appendix C to Justice Breyer's dissent) ("deaf people arrested and held in jail overnight

without explanation because of failure to provide interpretive services" (quoting Illinois at 572)); *id.* at 409 ("public libraries, state prisons, and other state offices lacked [telecommunications for the deaf]" (quoting Maryland at 787)); *id.* at 415 ("police arrested and jailed deaf person without providing interpretive services" (quoting North Carolina at 1161)).

In *Clarkson v. Coughlin*, 898 F. Supp. 1019 (S.D.N.Y. 1995), a class of deaf and hearing-impaired inmates brought suit against the state prison system. The court found that the prison's refusal to provide reasonable accommodations violated the Constitution. *Id.* at 1032-34. The court granted summary judgment to the class and held the prison in violation of the due process clause of the Fourteenth Amendment because of the prison's failure to provide interpreters for disciplinary proceedings, educational programs and essential communications with physicians. *Id.* at 1032-34, 1041-44, 1048-51. The court also found that the prison was deliberately indifferent, and, thus, in violation of the Eighth Amendment, in light of the prison's "systematic" refusal to enable hearing-impaired inmates to communicate with medical personnel. *Id.* at 1032-34, 1042-43; *see also id.* at 1049 (concluding the prison's "systematic pattern of inadequacy of treatment . . . caus[ed] class members unwarranted suffering"). Finally, the court held that the prison transgressed the Equal Protection Clause of the Fourteenth Amendment by excluding hearing-impaired female inmates from the few available assistive services. *Id.* at 1043-44, 1051.

Numerous other courts have found that state prisons discriminated against inmates with hearing and vision disabilities in violation of the United States Constitution. *See, e.g., Armstrong v. Davis*, 275 F.3d 849, 858 (9th Cir. 2001) (affirming district court's system-wide injunction

against California prison system based on the district court's holding that the state's parole and parole revocation hearings were "not in substantial compliance with the ADA or the Rehabilitation Act, and that it routinely denied plaintiffs their rights under the Due Process Clause of the United States Constitution"); *Koehl v. Dalsheim*, 85 F.3d 86, 88-89 (2d Cir. 1996) (reversing district court and holding that inmate properly stated a claim for violation of the Eighth Amendment when prison deprived inmate of medically-prescribed glasses); *Bonner v. Ariz. Dep't of Corr.*, 714 F. Supp. 420, 426 (D. Ariz. 1989) (holding that inmate "has a due process liberty interest in the presence of a qualified sign language interpreter at all stages in the prison's disciplinary procedure").

II. PROPHYLACTIC LEGISLATION IS AN APPROPRIATE RESPONSE TO PERSISTENT DISCRIMINATION AGAINST PRISONERS WITH DISABILITIES.

In *Tennessee v. Lane*, 541 U.S. 509 (2004), this Court explained that Title II of the ADA, 42 U.S.C. §§ 12101, 12141, *et seq.*, responds to a history of unequal treatment in, *inter alia*, the "administration of . . . the penal system." 541 U.S. at 525. Yet the Eleventh Circuit has misapplied this Court's Eleventh Amendment jurisprudence and declared Title II of the ADA unconstitutional and unenforceable in the prison administration context. The lower court's ruling is incompatible with the historical record of state discrimination against prisoners with disabilities compiled by Congress before enactment of the ADA.[6] The disregard of this

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[6] *See Lane*, 541 U.S. at 516 ("The ADA was passed by large majorities in both Houses of Congress after decades of deliberation and investigation into the need for comprehensive legislation to address discrimination against persons with disabilities. In the years immediately preceding the ADA's enactment, Congress held 13 hearings and created a special task

historical record is an affront to Congress's power to enforce the Fourteenth Amendment and protect against pervasive and enduring state constitutional violations.[7]

Consistent with the provisions of the Fourteenth Amendment, "Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct." *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 727-28 (2003); *see also City of Boerne v. Flores*, 521 U.S. 507, 518 (1997).

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force that gathered evidence from every State in the Union. The conclusions Congress drew from this evidence are set forth in the task force and Committee Reports, described in lengthy legislative hearings, and summarized in the preamble to the statute."); *see generally Crawford v. Ind. Dep't of Corr.*, 115 F.3d 481, 486 (7th Cir. 1997) (Posner, C.J.) ("The Americans with Disabilities Act was cast in terms not of subsidizing an interest group but of eliminating a form of discrimination that Congress considered unfair and even odious. The Act assimilates the disabled to groups that by reason of sex, age, race, religion, nationality, or ethnic origin are believed to be victims of discrimination. *Rights against discrimination are among the few rights that prisoners do not park at the prison gates.*") (citations omitted; emphasis added).

[7] Congress's enforcement power, as this Court has often acknowledged, is a "broad power indeed." *Lane*, 541 U.S. at 518 (citing *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 732 (1982)); *see also id.* at 518 n.3 ("'Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against state denial or invasion, if not prohibited, is brought within the domain of congressional power.'") (quoting *Ex parte Virginia*, 100 U.S. 339, 345-46 (1880)); *City of Boerne v. Flores*, 521 U.S. 507, 517-18 (1997). This Court's precedent "'accord[s] substantial deference to the predictive judgments of Congress,'" and the "sole obligation" of reviewing courts "is 'to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence.'" *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) ("*Turner II*") (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665-66 (1994) ("*Turner I*")).

To uphold Section 5 legislation, this Court must: (1) "identify with some precision the scope of the constitutional right at issue[,]" *Garrett*, 531 U.S. at 365; (2) "examine whether Congress identified a history and pattern of unconstitutional" conduct by states regarding that constitutional right, *id.* at 368; and (3) evaluate whether Congress's remedy is appropriate — that is, whether the remedy is congruent and proportional to the history and pattern of discrimination. *Lane*, 541 U.S. at 530.

First, regarding the scope of the constitutional right at issue, Title II as applied to prisoners with disabilities clearly "seeks to enforce a variety of other basic constitutional guarantees." *Lane*, 541 U.S. at 522-23. Indeed, state discrimination against prisoners with disabilities implicates a panoply of constitutional rights, including not just the Equal Protection Clause of the Fourteenth Amendment's ban on irrational disability discrimination, but also the Due Process Clause and the First and Eighth Amendments, as applied to the states through the Fourteenth Amendment.

Second, there can be no doubt that Congress identified a pattern of discrimination against prisoners with disabilities. Moreover, for the reasons just explained and consistent with the access to judicial services rights implicated in *Lane*, 541 U.S. at 532-33, such discrimination is more likely to implicate constitutional rights in the prison context than in almost any other, because states have affirmative constitutional obligations toward those they hold in custody.[8]

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[8] *See, e.g., Ruiz v. Estelle*, 503 F. Supp. at 1344-46 (finding that the Texas Department of Corrections "failed to meet its constitutional obligation to provide minimally adequate conditions of incarceration for mentally retarded inmates," in part, because the state refused to provide counsel or counsel substitute to assist mentally retarded inmates during disciplinary hearings).

Third, Title II is an appropriate remedial response to this history of discrimination in light of the extensive history of state infringement of the constitutional rights of prisoners with disabilities.[9] In responding to this pattern of discrimination, Congress, as in *Lane* and *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), confronted a "[d]ifficult and intractable problem," where previous legislative attempts had failed,[10] thus justifying added prophylactic measures in response. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 88 (2000); *see also Lane*, 541 U.S. at 531; *Hibbs*, 538 U.S. at 737 (upholding the FMLA as valid remedial legislation without regard to whether the failure to provide the statutorily mandated 12 weeks of leave violated the Fourteenth Amendment). That prophylactic remedy was designed to make it more practical for persons like vulnerable state prisoners to assert their rights. Not only does it authorize attorneys fees to prevailing parties, but it also eliminated the difficult burden of establishing the

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[9] In *Lane*, this Court broadly considered the full range of constitutional rights and Title II remedies at issue, framing its analysis in terms of the broad "class of cases implicating the accessibility of judicial services." 541 U.S. at 531. The Court's expansive review was appropriate because Congress necessarily responds not to the isolated claims of individual litigants, but to broad patterns of unconstitutional conduct by government officials. Accordingly, in this case it is appropriate to assess Title II's constitutionality as applied to the entire class of cases implicating, in this Court's words, "the administration of . . . the penal system." *Id.* at 525, 530-31.

[10] *See* S. Rep. No. 101-116, at 18 (section of report entitled "Current Federal and State Laws are Inadequate"); *see also* Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997 *et seq.* Pub. L. No. 96-247, 94 Stat. 349 (1980) (providing Attorney General the discretion to enforce the constitutional rights of inmates, but not creating a private right of action or imposing a reasonable accommodation requirement); S. Rep. No. 95-1056 at 17-18 (1978) (citing "unique inability of prisoners to assert their rights" and "inadequacy of legal services").

requisite state of mind of the defendant — a burden that has often prevented successful assertion of valid constitutional claims.

Just as past federal solutions were unavailing, Congress also found that state laws were "inadequate to address the pervasive problems of discrimination that people with disabilities are facing." H.R. Rep. No. 101-485(II), at 47, *reprinted in* 1990 U.S.C.C.A.N. at 329; *see also* S. Rep. No. 101-116, at 6 (1989) ("Discrimination still persists in such critical areas as . . . public services."); S. Rep. No. 101-116 at 18 (section of report entitled "Current Federal and State Laws are Inadequate"); H.R. Rep. No. 101-485(II), at 48, *reprinted in* 1990 U.S.C.C.A.N. at 330 (50 State Governors' Committees "report[ed] that existing State laws do not adequately counter . . . discrimination"). Among other things, Congress found that states — like their federal counterparts — failed to provide for private rights of action and compensatory damages, effectively leaving many victims of discrimination without available remedies.[11] For example, in enacting the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997, Congress cited "the possible conflicts of interest which State and other public officials appear to have

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[11] *See Americans with Disabilities Act of 1989: Hearings on S. 933 Before the Subcomm. on the Handicapped of the Comm. on Labor & Human Res.*, 101st Cong. 386-94 (1989) (statement of the Nat'l Coal. for Cancer Survivorship); *Employment Discrim. Against Cancer Victims & the Handicapped: Hearing on H.R. 370 & H.R. 1294 Before the Subcomm. on Employment Opportunities of the H. Comm. on Educ. & Labor*, 99th Cong. 62 (1985) (statement of Rep. Moakley) ("[O]ne-fourth of the states have no protection for the handicapped. Additionally, even those states with laws differ greatly in their regulations.") (ten-state survey showing gaps in coverage of laws).

in relation to institutionalized persons." H.R. Rep. No. 95-1058, at 7-8 (1978).[12]

In addressing the enduring problem of disability discrimination, Congress concluded that states were in many respects responsible for the "history of purposeful unequal treatment" and participants in "the continuing existence of unfair and unnecessary discrimination and prejudice" against individuals with disabilities, 42 U.S.C. §§ 12101(a)(7) & (9), and those conclusions are "entitled to much deference." *Kimel*, 528 U.S. at 81 (quotation marks omitted). As with state laws against gender discrimination that neither eliminated that continuing bias nor in any way weakened the rationale for subjecting states to federal prohibitions, *see Hibbs*, 538 U.S. at 729-37, Congress was likewise entirely justified in concluding that state laws against disability discrimination in state prisons had been wholly ineffective in combating the lingering effects of prior official discrimination and, of greater significance, in altering violative state behavior.[13]

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[12] *See also Civil Rights of Institutionalized Persons: Hearings on H.R. 2439 and H.R. 5791 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary*, 95th Cong. 293-95 (1977) (statement of Drew S. Days, III, Assistant Att'y Gen.); *Civil Rights of Institutionalized Persons: Hearings on S. 1393 Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 95th Cong. 31 (1977) (statement of Drew S. Days, III, Assistant Att'y Gen.) (providing examples from prisons of severe lack of adequate medical care resulting in critical injury and death, constitutionally inadequate conditions of confinement and acute physical abuse and criminal acts).

[13] It is not insignificant that states also remain free to, and have, indiscriminately removed prisoners from the protection of their disability discrimination statutes. *See, e.g.*, Mich. Comp. Laws § 37.1301(b).

In addition to the legislative history itself,[14] the substantial class of judicial decisions involving state unconstitutional discrimination against inmates with disabilities evinces the need for Congress's chosen remedy. *See, e.g.*, *Lane*, 541 U.S. at 525 & n.11 (citing cases that "document a pattern of unequal treatment in the administration of . . . the penal system"); *Garrett*, 531 U.S. at 391-424 (App. C to Justice Breyer's dissent) (citing excerpts from task force's examples of discrimination); *Yeskey*, 524 U.S. at 211-12 (noting that the ADA's findings about "discrimination 'in such critical areas as . . . . institutionalization,' can be thought to include penal institutions") (alteration in original; citation omitted).

Importantly, the extensive historical record includes numerous claims, like Petitioner's, asserting fundamental constitutional rights including: (i) the denial of access to religious services, law libraries, telephone and mail services, medical treatment, and rehabilitation, recreation, and work programs; (ii) the unconstitutional imposition (as in Petitioner's case) of disparate terms of confinement and restraint solely because of the individuals' disabilities; and (iii) the infliction of degrading, inhumane, and life-

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[14] The Court need not limit its review to the specific legislative record, although that record is replete with examples of unconstitutional state conduct in the areas encompassed by Title II and considered here. *See Lane*, 541 U.S. at 522-33 (relying on, *inter alia*, legislative history, statutes and judicial decisions); *see also Turner II*, 520 U.S. at 195 (examining evidence outside the legislative record to evaluate Congress's exercise of legislative power); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) (courts should presume that Congress is aware of relevant legal precedents when it enacts remedial legislation). *See generally Katzenbach*, 383 U.S. at 330 ("In identifying past evils," for which Section 5 legislation is appropriate, "Congress obviously may avail itself of information from any probative source," including the "information and expertise that Congress acquires in the consideration and enactment of earlier legislation").

threatening conditions on prisoners with disabilities nationwide. Those claims arise under the First and Eighth Amendments, as applied to the states through the Fourteenth Amendment, and the Fourteenth Amendment's Due Process and Equal Protection Clauses. It is notable that in the years between this Court's decision in *Estelle v. Gamble*, 429 U.S. 97 (1976), and Title II's enactment, federal courts found numerous constitutional violations that overlap with Title II as it is applied to prisons.[15] These representative cases — and those discussed in Part I, *supra* — exemplify just the sort of "confirming judicial documentation" absent from Title I. *Garrett*, 531 U.S. at 376 (Kennedy, J., concurring).

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[15] The Constitution forbids state prisons to act with deliberate indifference to the medical needs of prisoners. *Estelle v. Gamble*, 429 U.S. 97, 104-06 (1976). This practice can subject prisoners with disabilities to multiple punishments: in addition to their sentence, they suffer unnecessary pain, loss of dignity, and, in some cases, a shortened lifespan. At the time Title II was enacted, however, state prisons nevertheless continued to abuse prisoners with disabilities, denying them these fundamental constitutional protections. *See, e.g.*, *LaFaut*, 834 F.2d at 393-94 (deliberate indifference where paraplegic inmate was not provided convenient wheelchair-accessible toilet and was not provided adequate rehabilitation therapy during incarceration); Michael Mushlin, *Rights of Prisoners* § 3.15, at 167 n.199 (2d ed. 1993 & Supp. 2001) (collecting cases); *see also supra* Part I (discussing cases). While certainly not all constitutional claims by sick or injured inmates will be covered by Title II, it is nonetheless exceedingly difficult for inmates to satisfy the subjective element of the deliberate indifference standard — making prophylactic legislation inherently appropriate. *See Hibbs*, 538 U.S. at 736 (Congress justified in concluding that perceptions based on stereotype "lead to subtle discrimination that may be difficult to detect on a case-by-case basis"); *see also Lane*, 541 U.S. at 520 ("When Congress seeks to remedy or prevent unconstitutional discrimination, § 5 authorizes it to enact prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent, to carry out the basic objectives of the Equal Protection Clause").

In sum, the historical record in the instant case is significantly stronger than that justifying the appropriate application of Title II in *Lane*, and is far more robust than that in *Hibbs*. Accordingly, Title II of the ADA is a congruent and proportional response to state discrimination against inmates with disabilities. In fact, considering the vast historical evidence of these violations in the prison administration context, Title II accommodation seems *at the very least* reasonably tailored to provide the states with a practical method to avoid liability for constitutional violations in certain cases, notwithstanding the differences in proof underlying a Title II claim.

As *Hibbs* makes clear, once Congress identifies a predicate of unconstitutional conduct that it seeks to remedy, Congress has flexibility in fashioning the remedy. *See Hibbs*, 538 U.S. at 734 n.10, 736-40. Congress's Section 5 enforcement authority means nothing if it does not involve the power to ensure that constitutional violations are not left without a remedy. *See, e.g., id.* at 735-36; *Katzenbach*, 383 U.S. at 314-15. Congress properly chose a comprehensive remedial solution to this historical dilemma because to do otherwise would simply have placed disability rights in the same political vortex that for years proved utterly ineffective. *See* S. Rep. No. 101-116 at 13 (like "throwing an 11-foot rope to a drowning man 20 feet offshore and then proclaiming you are going more than halfway." (quoting Harold Russell, testifying for President's Comm. on Employment of People with Disabilities)).

The Court should not hesitate to uphold Congress's power to protect the constitutional rights of persons with disabilities in the prison context.

CONCLUSION

The judgment below should be reversed.

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v.

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TONY GOODMAN, *Petitioner*

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On Writs Of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus National Disability Rights Network ("NDRN"), formerly the National Association of Protection and Advocacy Systems ("NAPAS") is the membership association of protection and advocacy ("P&A") agencies which are located in all 50 states, the District of Columbia, Puerto Rico, and the territories (the Virgin Islands, Guam, American Samoa, and the Northern Marianas Islands). P&As are mandated under various federal statutes to provide legal representation and related advocacy services on behalf of all people with disabilities in a variety of settings. In fiscal year 2004, P&As served over 76,000 persons with disabilities through individual case representation and systemic advocacy. In FY 2004, four percent of the individuals served by P&As were living in jails or prisons.

The P&A system comprises the nation's largest provider of legally based advocacy services for persons with disabilities. P&As are particularly active in providing assistance to persons with disabilities under the Americans with Disabilities Act ("ADA"). Because of its national P&A membership and familiarity with the protections afforded by each state to persons with disabilities, NDRN has firsthand knowledge of the state laws and how they operate in practice. NDRN is thus uniquely suited to assist the Court in understanding the state law backdrop against which Congress

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[1] NDRN respectfully submits this brief in support of petitioners. No counsel for any party authored this brief either in whole or in part, and no persons other than the *amicus curiae* and their counsel made any monetary contribution to its preparation or submission. The parties' written consents to the filing of this brief have been filed with the Clerk of the Court.

enacted the ADA, as well as the status of that backdrop today.

SUMMARY OF ARGUMENT

As this Court recognized in *Tennessee v. Lane*, 541 U.S. 509, 525 (2004), Congress enacted Title II of the ADA "against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights."

Nowhere is this problem of discrimination more pronounced than in the prison context where state facilities and services govern every aspect of a prisoner's life. Unequal access to facilities or services can extend the length of a prison sentence or cause serve physical injury.[2] A pattern of unequal treatment of prisoners is well documented in the case law.[3] A comprehensive survey of state law confirms that prisoners seeking protection against discrimination are met with significant gaps and weaknesses in state anti-

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[2] See *Noland v. Wheatley*, 835 F. Supp. 476, 480-81 (N.D. Ind. 1993) (describing the deplorable conditions prisoners with disabilities face when reasonable accommodations are refused); *see also Herndon v. Johnson*, 970 F. Supp. 703, 703 (E.D. Ark. 1997) (plaintiff with fused spine denied mobility aides and other assistive devices necessary for bodily functions). *Key v. Grayson*, 179 F.3d 996 (6th Cir. 1999) (inmate who was deaf denied access to program allegedly required as precondition for parole).

[3] This Court in *Lane* cited several cases documenting the pattern of unequal treatment in the penal system: *LaFaut v. Smith*, 834 F.2d 389, 394 (4th Cir. 1987) (inmate with paraplegia unable to access toilet facilities); *Schmidt v. Odell*, 64 F. Supp. 2d 1014 (D. Kan. 1999) (inmate with double amputations forced to crawl around the floor of jail cell). 541 U.S. at 525.

discrimination laws. Even worse, some states have specifically exempted prisoners from the protection of state disability laws.

In *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206, 208-12 (1998), this Court held that the ADA applied in the prison context. However, the states of Michigan, Maine, and Georgia have all sought to limit ADA type protections for prisoners under state law.[4] In Michigan, for example, the state's anti-discrimination law specifically excludes a "state or county correctional facility with respect to an individual serving a sentence of imprisonment." Mich. St. Ann. §§ 37.2101 (1999). Thus, while state law is generally inadequate to address the needs of individuals with disabilities, it is particularly inadequate to protect prisoners. These prisoners need the protections and remedies afforded by the ADA.[5]

In Part I we briefly describe the ADA's coverage and its remedial scheme. In Parts II and III, we demonstrate that, when the ADA was enacted in 1990, thirty-four states had statutes that did not ensure access to state facilities and forty-nine states failed to provide access to state services in a manner equivalent to Title II. Finally, in Part IV, we demonstrate that state law remains inadequate today.

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[4] See pp. 28-30, *infra*.

[5] *See Love v. Westville Corr. Ctr*, 103 F.3d 558, 558-59 (7th Cir. 1996) (holding that, because inmate with quadriplegia was denied reasonable access to recreation facilities, the dining hall, and visitation facilities, he was also denied access to programs for substance abuse, education, church, work, and transition which were held in these inaccessible parts of the facility).

Without Title II, the ability of prisoners with disabilities to access important facilities and services would be greatly diminished.[6]

ARGUMENT

I. The ADA Provides Protection With Respect to Both State Facilities and State Services.

The ADA's coverage of state facilities and services has two main components: a general prohibition against discrimination in access to state facilities and services and a remedial scheme that deters such discrimination and provides appropriate relief when such discrimination occurs. Section 202, which prohibits discrimination in services, programs, and activities provides that:

> "[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity,

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[6] In this brief, we rely heavily on the work of Professors Ruth Colker and Adam Milani in a recent article in the Alabama Law Review. Ruth Colker and Adam Milani, *The Post-Garrett World: Insufficient State Protection Against Disability Discrimination*, 53 Ala. L. Rev. 1075 (2002). This article surveys current state law in detail and concludes that absent the protections of Title II of the ADA, the protection available to persons with disabilities would be greatly diminished in a majority of states. In an appendix to the article, the authors attach a comprehensive state-by-state summary of state disability law as it relates to Title II of the ADA. See also American Bar Association Commission on Mental and Physical Disability Law, *Monograph on State Disability Discrimination Laws* (2005) (providing a more recent overview of state disability discrimination laws from all fifty states and the District of Columbia).

> or be subjected to discrimination by any such entity."

42 U.S.C. § 12132. When state facilities, including prisons, are not accessible, persons with disabilities are systematically denied the "services, programs, [and] activities" provided by the state. The ADA provides a remedial scheme so that plaintiffs may obtain injunctive relief and damages. It also allows a successful plaintiff to receive "a reasonable attorney's fee." Section, 505, 42 U.S.C. § 12205. This set of remedies gives states a strong incentive to provide access to facilities and services and provides adequate redress for a person who encounters discrimination by the state.

Since 1990, persons with disabilities have relied on Title II to challenge numerous discriminatory acts involving core governmental functions. Title II has been used to challenge discriminatory acts involving voting,[7] institutionalization,[8] education,[9] prisoners' rights,[10] law

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[7] See, *e.g.*, *New York ex rel. Spitzer v. County of Schoharie*, 82 F. Supp. 2d 19 (N.D.N.Y. 2000) (failure to ensure that polling places were accessible to people with disabilities violated Title II); *Doe v. Rowe*, 156 F. Supp. 2d 35 (D. Me. 2001) (overbroad exclusion of individuals with mental illness from voting violated Title II).

[8] See, *e.g.*, *Olmstead v. L.C., ex rel. Zimring*, 527 U.S. 581 (1999) (unjustified institutional isolation of persons with disabilities violates Title II).

[9] See, *e.g.*, *Assoc. for Disabled Ams., Inc. v. Fla. Int'l Univ.*, 405 F.3d 954 (2005) (students with disabilities sued university for failure to make accommodations, which caused a denial of access to programs and facilities); *Wong v. Regents of the Univ. of Cal.*, 192 F.3d 807 (9th Cir. 1999) (student with disability sued to require university to make reasonable modification).

enforcement,[11] and public assistance programs.[12] Title II has been critically important in protecting the rights of persons with disabilities in prisons. Indeed, since prisons "control virtually every aspect of the lives of the individuals who must inhabit them, the types of barriers and discrimination they face are varied and pervasive."[13] As detailed below, the overwhelming majority of state laws have not adequately addressed the exclusion of people with disabilities from government facilities and services.

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[10] See, *e.g.*, *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206 (1998) (Title II applies to state correctional facilities).

[11] See, *e.g.*, *Barnes v. Gorman*, 536 U.S. 181 (2002) (plaintiff sued police department for injuries sustained while being transported in a van not equipped to hold a wheelchair).

[12] See, *e.g.*, *Lovell v. Chandler*, 303 F.3d 1039 (9th Cir. 2002), cert. denied, 537 U.S. 1105 (2003) (exclusion of persons with disabilities from state health insurance program violated Title II).

[13] James R. Pingeon, *A Guide to Litigation Under the Americans with Disabilities Act in Prisons and Jails* (2000), available online at http://www.centerforpublicrep.org/page/73964;cat_id=769. See also, *e.g.*, *Armstrong v. Wilson*, 942 F.Supp. 1252, 1254-55 (N.D. Cal. 1996) (noting that, among other things, the California Department of Corrections' facilities and services were inaccessible to prisoners with disabilities because facilities did not have "visual alarms" to alert prisoners with hearing impairments of emergencies, because inmates with severe disabilities had been improperly classified and were, as a result, earning fewer credits against their sentences than non-disabled inmates, and because the range of vocational programs made available to inmates with disabilities was more limited than those made available to non-disabled prisoners); *Montez v. Romer*, 32 F.Supp.2d 1235 (D. Colo. 1999) (disabled prisoners were denied access to law libraries, visiting areas, yard areas, laundry facilities, dining halls, recreational facilities, bathing and restroom facilities, medical clinics, prison employment, vocational training, and rehabilitation services because of their disabilities).

II. At the Time the ADA Was Enacted, Individual State Laws Failed To Ensure Persons with Disabilities Access to State Facilities.

A. Coverage of State Facilities

Title II addressed important shortcomings in state law by prohibiting states from discriminating in access to all state facilities, such as prisons, court houses and schools, as well as public sidewalks, streets, and recreational facilities.

At the time Congress passed the ADA, thirty-four states had laws with one or more significant shortcomings. Four states lacked statutes that applied to state facilities other than buildings. For example, the state of Tennessee had a policy requiring accessibility in all "public buildings," but did not include other facilities such as streets, sidewalks, and recreational facilities. Tenn. Code Ann. § 68-18-202 (1990). *Id.* § 68-18-203(2) (1990).[14]

Furthermore, some state statutes which covered state facilities were too vague to be affective. For example, Nebraska's statute contained some specific requirements for

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[14] See also N.J. Stat. Ann. § 52:32-4 (1990) (public buildings required to "provide facilities for the physically handicapped") and *Doe v. Div. of Youth & Family Servs.*, 148 F. Supp. 2d 462, 496 (D.N.J. 2001) (holding that some state facilities are not covered by public accommodation statute); Ohio Rev. Code Ann. § 3781.111(A) (2005) (historical text unavailable) (covers public buildings but not facilities), and *id.* §§ 4112.02(G), 4112.01(A)(9) (2005) (historical text unavailable) (discrimination in public accommodations prohibited, but definition of public accommodation does not explicitly include the state); Wis. Stat. Ann. § 101.13(2)(d) (1990) (covers public buildings but not facilities).

facilities accessibility and provided that the "Public Buildings Safety Advisory Committee *may* promulgate and implement codes. . . ." Neb. Rev. Stat. § 72-1122 (1990) (emphasis added). Thus it was left to the Public Buildings Safety Advisory Committee to decide whether to adopt standards to comply with vague requirements. *Id.* § 72-1108.

In all, thirty-four states had facility accessibility provisions with one or more significant shortcomings. These shortcomings standing alone provided Congress with sufficient justification for passing Title II. See *Hibbs*, 123 S. Ct. at 1980-81 (relying on shortcomings in only fourteen states).

B. Remedies With Respect to State Facilities

In prohibiting discrimination in access to state facilities, Congress recognized that "the rights guaranteed by the ADA are meaningless without effective enforcement provisions" and that "the inclusion of penalties and damages i[s] the driving force that facilitates voluntary compliance." S. Rep. No. 101-116, at 15 (1989). Congress was also aware of a report by the U.S. Commission on Civil Rights that found that seventy-six percent of state buildings were not accessible to persons with disabilities even though many states had statutes requiring that such buildings be accessible. See U.S. Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities* 39 (1983). Thus, Congress allowed persons with disabilities to recover damages and attorney's fees when states failed to comply with Title II. See Sections 203 and 505, 42 U.S.C. §§ 12133 & 12205.

At the time Congress enacted the ADA most states failed to provide equivalent relief for discrimination in access

to state facilities, thus depriving their accessibility "requirements" of any real meaning. For example, in 1990 the State of Georgia had a policy eliminating, "insofar as possible, unnecessary physical barriers encountered by handicapped * * * persons whose ability to participate in the social and economic life of this state is needlessly restricted when such persons cannot readily use government buildings, public buildings, and facilities used by the public." Ga. Code Ann. § 30-3-1 (1990).[15] The responsibility for the administration and enforcement of this policy, however, fell by statute to "[l]ocal governing authorities." See *id.* § 30-3-5(c). No private right of action for enforcement of this policy was available. Georgia and other states that did not provide meaningful enforcement mechanisms had no incentive to comply with their own accessibility statutes and failed to provide relief to individuals who suffered discrimination.

1. Private Right of Action for Damages

The private right of action for damages provided by Title II serves several important purposes. First, the threat of damages creates a strong incentive not to discriminate in access to state facilities. See *Owen v. City of Independence*, 445 U.S. 622, 651–52 (1980) (noting the deterrent effect of damage remedies on governmental conduct). Second, a person with a disability who suffers discrimination at the hands of the state should be able to recover for any

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[15] In this brief, all citations to state statutes are taken from the online databases on either Westlaw or Lexis. The citations to historical statutes were taken from the databases on those services for the year identified. Citations to current law are taken from the current statute databases and identified as 2005.

compensable harm that is attributable to the discrimination. *Bivens v. Six Unknown Named Agents of Fed. Bur. of Narcotics*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring). Finally, a damage remedy is particularly important when an individual is denied access to a state facility to which he may never return because he may lack standing to seek injunctive relief under this Court's precedents. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992). *See, e.g., Gorman v. Bartch*, 152 F.3d 907, 911-12 (8th Cir. 1998) (holding ADA applicable to post-arrest transportation of person using a wheelchair). Thus, for some persons with disabilities, it may be that "damages [are] the only possible remedy." *Bivens*, 403 U.S. at 409.

A survey of state accessibility statutes in 1990 reveals that thirty-one states either did not clearly allow a person who was illegally denied access to a facility to sue for damages, or significantly restricted such relief. First, nineteen states provided no clear private right of action for facilities discrimination. For example, Alabama's statute had two provisions requiring state facilities to be accessible. See Ala. Code §§ 21-4-4, 21-7-2 (1990). Section 21-4-4 was enforced by the state fire marshal who could order compliance, see Section 21-4-7, while Section 21-7-2 could only be enforced by a misdemeanor penalty, see Section 21-7-5. Because a state prosecutor cannot bring a criminal action against the state, the misdemeanor penalty does not even apply to state discrimination. Thus, Alabama provided

no private right of action against the state for discrimination in providing access to the state's facilities.[16]

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[16] See also Ariz. Rev. Stat. Ann. § 34-438 (1990) (state has enforcement authority); Ark. Code Ann. § 20-14-302 (1990) (only penalty a misdemeanor) and *id.* § 20-14-610 (1990) (state has enforcement authority); Cal. Gov't Code § 4458 (1990) (government can "bring an action to enjoin a violation") and *Black v. Dep't of Mental Health*, 100 Cal. Rptr. 2d 39 (Ct. App. 2000) (affirming lower court's finding that state is not a "business establishment[ ]" covered by Cal. Civ. Code § 51 (1990); Ga. Code Ann. § 30-3-5 (1990) (state has enforcement authority) and *id.* § 30-4-3 (1990) (only penalty a misdemeanor); Haw. Rev. Stat. Ann. § 489-7.5 (1990) (provision allowing private right of action not effective until 1991); Idaho Code § 39-3201 (1990) (state has enforcement authority); Ind. Code Ann. §§ 22-9-8-1, -3 (2005) (see historical notes) (provisions allowing private right of action under Ind. Code Ann. § 22-9-1-2 (1990) not effective until 1994) and *id.* § 22-15-2-7 (1990) (state has enforcement authority); Md. Ann. Code art. 49B, § 5 (1990), and *Johnson v. Tufton Group, Inc.*, No. CIV. L-99-144, 2001 WL 210046, at *4 (D. Md. Feb 28, 2001) (only state agency may enforce art. 49B, § 5); Miss. Code Ann. § 43-6-11 (1990) (misdemeanor is only penalty specified) and *id.* § 43-6-123 (1990) (state given limited enforcement authority); N.D. Cent. Code § 48-02-19 (1991) (see historical notes in 1991 database) (no enforcement mechanism for violations); N.H. Rev. Stat. Ann. § 354-A:22 (2005) (see historical notes in 2005 database) (provision allowing private right of action effective in 1992); N.Y. Pub. Bldgs. Law § 50(1), 51 (1990) (no private right of action specified) and N.Y. Exec. Law § 296(2)(a) (1990) (does not clearly apply to the state); Neb. Rev. Stat. Ann. § 20-129 (1990) (misdemeanor is only penalty specified) and *id.* §§ 72-1119, 72-1124 (1990) (state given limited enforcement authority but misdemeanor only penalty specified); Okla. Stat. tit. 25 § 1402 (1990) (no private right of action specified); S.D. Codified Laws § 20-13-35.1 (2005) (see historical notes in 2005 database) (provision allowing private right of action added in 1991) and *id.* § 5-14-14 (1990) (state enforces building code); Tenn. Code Ann. § 68-120-205(b) (1990) (no penalty may be assessed against the state); Utah Code Ann. § 26-29-4 (1990) (state has limited enforcement

Second, in three additional states an individual could bring a private right of action, but could not recover damages (even for intentional discrimination).[17] Six other states did not provide adequate relief because of limits on the amount of damages that an individual could recover. In South Carolina, for example, a successful plaintiff's recovery of actual damages was limited to $5,000. See S.C. Code Ann. § 43-33-540 (1990).[18] Finally, three states allowed a private right of action for damages against the state but this remedy

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authority) and *id.* 26-30-4 (1990) (misdemeanor is only penalty specified); Wyo. Stat. Ann. § 35-13-203 (1990) (misdemeanor is only penalty specified) and *id.* § 16-6-501 (1990) (state given limited enforcement authority).

[17] See Colo. Rev. Stat. Ann. § 24-34-306 (1990) (allowing private right of action) and *City of Colo. Springs v. Conners*, 993 P.2d 1167, 1171 (Colo. 2000) (holding that Colorado Governmental Immunity Act bars compensatory damages against the state but permits equitable relief for civil rights violations allowed); Conn. Gen. Stat. Ann. § 46a-99 (1990) (injunctive relief only); N.C. Gen. Stat. § 168A-11(b) (1990) (allows declaratory and injunctive relief but not damages).

[18] See also Fla. Stat. Ann. § 768.28 (1990) (relief against state capped at $100,000); Kan. Stat. Ann. § 44-1005(k) (1990) ($2,000 limit on damages for pain, suffering and humiliation); Nev. Rev. Stat. Ann. § 651.090(1) (1991) (see historical notes in 1991 database) (Section 41.035 (1991) imposes a $50,000 limit on tort damages against state and state employees); Va. Code Ann. § 51.5-46(A) (1990) (allows compensatory damages but prohibits damages for pain and suffering); W. Va. Code Ann. §§ 5-11-13(c), 5-11-10 (1991) (see historical notes in 1991 database) (while compensatory damages are available in court, a complainant in an administrative proceeding could only receive incidental compensatory damages, the modern equivalent of $1,000 in 1977).

was not clearly available for discrimination involving all state facilities.[19]

2. Attorney's Fees

Attorney's fees, like damages, play a critical role in the enforcement of facility accessibility requirements. Enforcement rights laws is dependent to a large degree on causes of action filed by plaintiffs acting as "private attorney[s] general." *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) ("If successful plaintiffs were routinely forced to bear their own attorney's fees, few aggrieved parties would be in a position to advance the public interest by invoking the power of the federal courts.").[20] Without attorney's fees, an individual who has suffered discrimination may not be able to find an attorney willing to file an action on his or her behalf. See, *e.g.*, H.R.

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[19] See N.J. Stat. Ann. § 10:5-13 (1990) (allowing private right of action for violations of public accommodation statute) and *Doe v. Div. of Youth & Family Servs.*, 148 F. Supp. 2d 462, 496 (D.N.J. 2001) (holding that public accommodation statute coverage is limited to the few state facilities listed in the statute); Ohio Rev. Code Ann. § 4112.99 (1990) (private right of action not clearly applicable to facilities other than "public buildings"); Wis. Stat. Ann. § 101.13(4) (1990) (private right of action not clearly applicable to facilities other than "public buildings" and recovery limited to costs, disbursements and attorney's fees).

[20] See generally S. Rep. No. 94-1011, at 2–6 (1976), part of the legislative history of the Civil Rights Attorney's Fees Awards Act of 1976, which added what is now Rev. Stat. § 722(b), 42 U.S.C. § 1988(b). The attorney's fee provision of the ADA, Section 505, 42 U.S.C. § 12205, was based on the Civil Rights Attorney's Fees Awards Act. H.R. Rep. No. 101-485, pt. 3, at 73 (1990). Thus, the discussion of attorney's fees in the legislative history of the 1976 statute is relevant to the ADA provision as well.

Rep. No. 94-1558, at 1 (1976) ("Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts * * *.").

The role of attorney's fees is particularly critical for prisoners, whose financial constraints would otherwise limit their ability to bring a valid civil rights claim. *See* Karen M. Koltz, Comment, *The Price of Civil Rights: The Prison Litigation Reform Act's Attorney Fee-Cap Provision as a Violation of Equal Protection of the Laws*, 73 Temple L. Rev. 759, 763 (2000) (recognizing that the "concerns that prompted Congress to enact the fee-shifting provisions are perhaps most pronounced in cases where the civil rights violation involves prisoners"); *see also Baker v. Ohio Dep't of Rehab. & Corr.*, 761 N.E.2d 667, 752 (Ohio Ct. App. 2001) (noting the difficult problems raised when *pro se* plaintiffs attempt to identify the various legal issues raised by an ADA case).[21]

Nevertheless, seven of the states that allowed some private right of action against the state did not provide for attorney's fees for a successful plaintiff.[22] Three states that

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[21] The Prison Litigation Reform Act ("PLRA") places significant restrictions on the relief available to prisoners, including limitations on the recovery of attorney's fees in any actions in which fees are authorized under the Civil Rights Attorney's Fees Act of 1976, 42 U.S.C. § 1998. The Ninth Circuit has held that the PLRA's cap on attorney's fees does not apply in the context of the ADA, as the ADA has its own attorney's fee provisions. *See Armstrong v. Davis*, 318 F.3d 965, 974 (9th Cir. 2003).

[22] A person with a disability is generally guaranteed attorney's fees only if the state had an explicit attorney's fees provision applicable to state

covered facilities and allowed a full private right of action against the state for damages did not have an attorney's fees provision.[23] Four other states that allowed only a limited private right of action against the state for facilities violations did not allow attorney's fees.[24]

III. At the Time the ADA Was Enacted, Individual State Laws Failed To Protect Persons with Disabilities Against Discrimination in the Provision of State Services.

In addition to providing inadequate protection from discrimination in access to state facilities, states provided

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discrimination in providing access to facilities. See, *e.g.*, *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 269 (1975) (tracing origins and development of American rule, which provides that courts generally may not award attorney's fees absent a legislative instruction to do so); *Sutherland v. Nationwide Gen. Ins. Co.*, 657 N.E.2d 282–83 (Ohio Ct. App. 1995) (refusing to award attorney's fees to a plaintiff who sued under an Ohio anti-discrimination law allowing "other appropriate relief" because statute did not explicitly authorize recovery of attorney's fees).

[23] See Pennsylvania (section in current law allowing attorney's fees, see Pa. Stat. Ann. tit. 43, § 962(c.2) (2005), effective in 1991); R.I. Gen. Laws § 42-87-4 (1990) (relief provision does not include attorney's fees); Tex. Hum. Res. Code Ann. § 121.004(b) (1990) (same).

[24] See Colo. Rev. Stat. Ann. §§ 24-34-605, 24-34-306 (1990) (relief does not include attorney's fees); Conn. Gen. Stat. Ann. § 46a-99 (1990) (relief provision does not include attorney's fees); Kan. Stat. Ann. § 44-1005 (1990) (same); Ohio Rev. Code Ann. § 4112.99 (2005) (historical text unavailable) (allowing damages and "other appropriate relief" for some facilities violations) and *Sutherland v. Nationwide Gen. Ins. Co.*, 657 N.E.2d 281, 283 (Ohio Ct. App. 1995) (finding that Ohio Rev. Code Ann. § 4112.99 does not authorize attorney's fees).

even less protection with respect to state services. Many state laws failed to address state services at all, and many that did had substantial shortcomings in both the coverage and the remedies provided.

A. Coverage of State Services

When the ADA was enacted, twenty-six states provided no protection against disability discrimination in the provision of public services and programs. First, statutes in three states—Arizona, Kentucky, and Tennessee—did not cover persons with disabilities at all.[25] Second, in thirteen states, the general public accommodation statute either did not cover or was not enforceable against the state. For example, in Georgia, no civil remedies were provided in the statute; rather a violation constituted a misdemeanor and such a proceeding could not be brought against the state." See Ga. Code Ann. § 30-3-6 (1990).[26] In other states, the types of public accommodations covered by the statute did not expressly include state-run accommodations and services. See, *e.g.*, Cal. Civ. Code § 51 (1990) (prohibiting discrimination on the basis of physical disability by "business establishments"), and *Black v. Dep't of Mental*

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[25] See Ariz. Rev. Stat. § 41-1441 (1990); Ky. Rev. Stat. Ann. § 344.120 (1990); Tenn. Code Ann. § 4-21-501 (1990).

[26] See also Ala. Code § 21-7-5 (1990) (only penalty a misdemeanor); Ark. Code Ann. § 20-14-302 (1990) (same); Ga. Code Ann. § 30-3-6, (1990) (same); Idaho Code § 39-3210 (1990) (same); Miss. Code Ann. § 43-6-11 (1990) (same); Neb. Rev. Stat. § 20-129 (1990) (same); Utah Code Ann. § 26-30-4 (1990) (same); Wyo. Stat. Ann. § 35-13-203 (1990) (same).

Health, 100 Cal. Rptr. 2d 39, 42 n.4 (Ct. App. 2000) (violation a misdemeanor; no civil remedies).[27]

Finally, twenty states had statutes prohibiting disability discrimination with respect to general public accommodations, but these statutes did not clearly cover "services." For example, as the Supreme Court of Washington explained, "[w]hile entitlement to services may be in the ADA, the Legislature has not enacted a counterpart to the ADA in Washington creating such entitlements." *Fell v. Spokane Transit Authority*, 911 P.2d 1319, 1329 (Wash. 1996).[28]

Of the twenty states that failed to cover discrimination in the provision of services, ten also failed to cover the state (and hence already have been counted in the thirteen states listed above).[29] Ten additional states,

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[27] See also Del. Code Ann. tit. 6, § 4501 (1990) and Del. Op. Att'y Gen. No. 00-IB09 (May 30, 2000), 2000 WL 1092966 (Del. A.G.) (state is not covered by statute); N.H. Rev. Stat. Ann. § 155:39-b (1990) (providing a narrow definition of "public accommodation" that does not expressly include the state); N.J. Stat. Ann. § 10:5-5 (1990) (definition of "public accommodation" does not include state under *Doe v. Division of Youth & Family Services*, 148 F. Supp. 2d 462, 496 (D.N.J. 2001)); Wis. Stat. Ann. § 101.22(1m)(bp) (1990) (providing definition of public accommodation that does not expressly include the state).

[28] See Colker and Milani, 53 Ala. L. Rev. at 1093–94, for discussion of case and similar case in Ohio.

[29] See Ala. Code § 21-7-3 (1990); Ark. Code Ann. § 20-14-303 (1990); Del. Code Ann. tit. 6, § 4501 (1990); Ga. Code Ann. § 30-3-1 (1990); Idaho Code § 39-3201 (1990); Miss. Code Ann. § 43-6-5 (1990); Neb. Rev. Stat. § 20-127 (1990); Utah Code Ann. § 26-30-1 (1990); Wis. Stat. Ann. § 101.22(9)(a) (1990); Wyo. Stat. Ann. § 35-13-201 (1990).

including Washington, had statutes that did cover the state, at least with respect to its buildings, but failed to cover services.[30]

Adding up the three states that had statutes that did not cover disability discrimination, the thirteen states that had statutes that did not cover the state, and the ten additional states that did cover the state but did not cover services, there were twenty-six states that failed to provide statutory protection against disability discrimination with respect to state services.

The failure of states to assure that individuals with disabilities are afforded equal access to state services has a particular impact on prisoners with disabilities. As this Court has recognized, "[m]odern prisons provide inmates with many recreational 'activities,' medical 'services,' and educational and vocational 'programs,' all of which at least theoretically 'benefit' the prisoners (and any of which disabled prisoners could be 'excluded from participation in.'"). *Yeskey*, 524 U.S. at 210. Services offered prisoners serve an important rehabilitative function by preparing them

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[30] Fla. Stat. Ann. § 413.08(1) (1990) (public accommodations statute does not cover services), but see Fla. Stat. Ann. § 393.13 (1990) (covering services discrimination with respect to narrowly defined population of "developmentally disabled"); Ind. Code Ann. § 22-9-1-2(a) (1990); Md. Ann. Code art. 49B, § 7 (1990); Me. Rev. Stat. Ann. tit. 5, § 4551 (1990); N.Y. Exec. Law § 296(2)(a) (1990); Ohio Rev. Code Ann. § 4112.02 (2002) (historical text unavailable), see also *Davis v. Flexman*, 109 F. Supp. 2d 776 (S.D. Ohio 1999) (holding that statute does not apply to services); N.D. Cent. Code § 48-02-19 (1991) (see historical notes in 1991 database); Tex. Hum. Res. Code Ann. § 121.001 (1990); Vt. Stat. Ann. tit. 9, § 4502 (1990).

for "independent living and vocational rehabilitation." *Bonner v. Lewis*, 857 F.2d 559, 562 (9th Cir. 1988).[31] Without equal access to prison programs and services, prisoners with disabilities are less likely to achieve rehabilitative goals of the prison system, and are more likely to fail upon their release.[32]

Moreover, the failure of many states to provide prisoners with disabilities equal access to state services can extend their time in prison. For example, in *Armstrong v. Wilson*, 942 F.Supp. 1252, 1255 (N.D. Cal. 1996), the court found that, among other things, "[s]ome inmates with severe

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[31] See also *Raines v. State*, 983 F.Supp. 1362, 1367 (N.D. Fla 1997) (prison official attesting that "assignments to work programs also have a rehabilitative aspect"); *Armstrong v. Wilson*, 942 F.Supp. 1252, 1256 (N.D. Cal. 1996) (noting that Rehabilitation Act's goal of fostering independent living for individuals with disabilities mirrors rehabilitative goals of prison system).

[32] Numerous cases confirm that prisoners with disabilities are routinely denied equal access to state programs and services while incarcerated. See, e.g., *Hicks v. Armstrong*, 116 F.Supp.2d 287, 290 (D. Conn. 1999) (prisoner with disability "was often segregated from other pretrial detainees and denied participation in many of the correctional facilities' educational programs, recreational activities and religious services. No efforts were made to accommodate his requests to participate or to make these programs accessible to him"); *Raines v. State*, 983 F.Supp. 1362, 1373 (N.D. Fla. 1997) (noting that structure of statutorily-created work program "exclude[d] persons with disabilities from enjoying the full opportunity to participate"); *Love v. McBride*, 896 F.Supp. 808, 809-10 (N.D. Ind. 1995) (prisoner with disability repeatedly denied access to "programs and services such as education, a group substance abuse program, the transition program, commissary, outside recreation, *** a prison job, *** education, and [use of] the law library" because of the need to confine him to a particular housing unit due to his disability).

disabilities have been inappropriately classified [in the prison work program] and only earn 1/3 instead of 1/2 time credits against their sentences." See also *Mitchell v. Mass. Dep't of Corr.*, 190 F.Supp.2d 204, 207-08, 212-13 (D. Mass 2002) (prisoner with disability denied opportunity to participate in prison programs and earn sentence-reduction credits).

B. Limitations in Coverage of State Services

We have established that only twenty-four states had any form of statutory protection against discrimination in the provision of state services. As we demonstrate below, many of those statutes failed to cover critical populations of persons with disabilities. They also by and large failed to require that states make reasonable modifications in such services to ensure that persons with disabilities would not be denied the benefits of public services. Finally, in many of the states, the remedies with respect to discrimination in public services were inadequate.

1. Definition of Persons with Disabilities

A critical step in preventing discrimination on the basis of disability is to define the protected class in a way that adequately covers the relevant physical and mental disabilities. Section 3(2) of the ADA defines "disability" to mean:

> "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> "(B) a record of such an impairment; or

"(C) being regarded as having such an impairment.

42 U.S.C. § 12102(2).

Surveying state law in 1990, numerous states failed to cover one or more of these categories. For example, Nevada and Kansas each had statutes that prohibited discrimination in the provision of services, but their coverage of persons with disabilities was limited to those with "physical and visual" impairments (Nev. Rev. Stat. Ann. § 651.070 (1991) (see historical notes in 1991 database) or those with a "physical handicap" (Kan. Stat. Ann. § 44-1009(c)(3) (1990)). Similarly, South Carolina prohibited discrimination against persons because of "handicap" but specifically excluded persons with "mental illness." See S.C. Code Ann. §§ 43-33-520, 43-33-560 (1990).[33]

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[33] The exclusion of persons with mental impairments was also pervasive in states which did not cover discrimination in the provision of state services as listed in Part A above. See Ala. Code § 21-7-3 (1990); Ark. Code Ann. § 20-14-303 (1990); Cal. Civ. Code § 51 (1990) (only covering physical disability) and Cal. Gov't Code § 12944 (1990) (specifically relating to licensing boards but only covering "medical conditions or physical handicap" and not "mental handicap"); Del. Code Ann. tit. 6, § 4501 (1990); Fla. Stat. Ann. § 413.08(1) (1990) and Fla. Stat. Ann. § 393.13 (1990) (narrow coverage only for developmental disabilities); Ga. Code Ann. § 30-3-1 (1990); Idaho Code § 39-3201 (1990); Miss. Code Ann. § 43-6-5 (1990); Neb. Rev. Stat. § 20-127 (1990); N.D. Cent. Code § 48-02-19 (1991) (see historical notes in 1991 database); N.H. Rev. Stat. Ann. § 354-A:3 (1990) (excluding mental illness from the definition of "physical or mental disability"); Utah Code Ann. § 26-29-2 (1990); Wis. Stat. Ann. § 101.22(1m)(b) (1990) (narrow coverage only for developmental disabilities); Wyo. Stat. Ann. § 35-13-201(a) (1990).

In addition, eleven of the states that prohibited disability discrimination in the provision of public services failed to include in the protected class persons who are "regarded as" having an impairment and persons who have a "record of" an impairment.[34] For example, the Second Circuit drew a "stark contrast" between the scope of Connecticut's anti-discrimination law and the ADA.

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[34] See Conn. Gen. Stat. Ann. § 46a-64 (1990); Iowa Code Ann. § 601A.2 (1990); Kan. Stat. Ann. § 44-1002 (1990); Mass. Gen. Laws ch. 272, § 98 (1990); Mich. Comp. Laws § 37.1103 (1990); Mo. Rev. Stat. § 213.010 (1990) (definitions do not include "record of"); Mont. Code Ann. § 49-2-101 (1990) (according to 1991 statute annotation, until 1991 amendment neither group included in definitions); Nev. Rev. Stat. Ann. § 651.050 (1990) (according to 1989 Westlaw database and annotations to current statute, neither group was included in this statute or any others relating to persons with disabilities); Pa. Stat. Ann. tit. 43, § 954 (1990) (neither group included until this statute was amended in 1991); S.C. Code Ann. § 43-33-560 (1990); Va. Code Ann. § 51.5-3 (1990) (definitions do not include "regarded as").

Another eighteen states that did not have protection with respect to the state services also failed to include these elements in their definition of disability with respect to discrimination in public accommodations. See Ala. Code § 21-7-3 (1990); Ark. Code Ann. § 20-14-303 (1990); Cal. Gov't Code § 12926 (1990); Del. Code Ann. tit. 6, § 4501 (1990); Fla. Stat. Ann. § 413.08 (1990); Ga. Code Ann. § 30-3-1 (1990); Idaho Code § 39-4126 (1990); Ind. Code Ann. § 22-9-1-3(r) (1990); Md. Ann. Code art. 49B, § 5 (1990); Me. Rev. Stat. Ann. tit. 5, § 4553 (1990); Miss. Code Ann. § 43-6-5 (1990); Neb. Rev. Stat. § 20-127 (1990); N.H. Rev. Stat. Ann. § 354-A:3 (1990); Tex. Hum. Res. Code Ann. § 121.002(4) (1990); Utah Code Ann. § 26-29-2 (1990); Wash. Rev. Code Ann. § 70.84.010 (1990); Wis. Stat. Ann. § 101.13 (1990); Wyo. Stat. Ann. § 35-13-201(a) (1990).

Beason v. United Tech. Corp., 337 F.3d 271, 279-80 (2d Cir. 2003).[35]

The decision by many states to narrowly define "disability" in their anti-discrimination statutes has had a particularly negative impact on the prison population. "Many of the women and men who cannot get mental health treatment *** are swept into the criminal justice system after they commit a crime."[36] In fact, in the United States, there are three times more people with mental illness in prisons than in mental health hospitals.[37] As detailed above, at the time that Congress enacted the ADA, state statutes provided this particularly vulnerable group little, if any, protection.

2. Reasonable Modification

Another significant problem with many state statutes was their failure to require states to make even simple modifications to their services and programs to avoid excluding persons with disabilities from participating in such services and programs. In passing the ADA, Congress

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[35] See also *Mowat v. Transp. Unlimited, Inc.*, 894 F.2d 230, 232 (8th Cir. 1992), *citing Annear v. State*, 454 N.W.2d 869, 874-75 (Iowa 1990) (holding that Iowa's anti-discrimination statute does not provide a cause of action based on perceived disability).

[36] Human Rights Watch, *Ill-Equipped: U.S. Prisons and Offenders with Mental Illness* (2003), at 1, 18 available online at http: www.hrw.org/reports/2003/usa1003/usa1003.pdf., *citing* NAMI, *Criminalization of the Mentally Ill* (2001), at 1, available online at http://www.nami.org/Content/ContentGroups/Policy/criminalization2001.pdf.

[37] *Id.* at 18.

recognized that such a requirement was essential to ensure that discrimination could not persist under false rationales. The ADA defines a "qualified individual with a disability" as a person who,

> "with or without *reasonable modifications* to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity."

Section 201(2), 42 U.S.C. § 12131(2) (emphasis added).[38] Public entities, including states, are required to make "reasonable modifications" in order to insure that persons with disabilities can participate in and benefit from public services. Nevertheless, when Congress enacted Title II, few state laws contained an express obligation to make such modifications with respect to such services.[39]

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[38] The Attorney General's regulations issued pursuant to Section 204(a), 42 U.S.C. § 12134(a), interpret this definition to require a public entity to "make reasonable modifications in policies, practices, or procedures" as defined at 28 C.F.R. § 35.130(b)(7) (2003) (emphasis added).

[39] Minn. Stat. Ann. § 363.03(3)(2), (4)(1) (1991) (see historical notes in 1991 database), Mo. Ann. Stat. § 213.010(8) (1990), N.C. Gen. Stat. § 168A-3(10)(b) (1990); S.D. Codified Laws § 20-13-23.7 (1990) Four other states had statutes incorporating the "programs and activities" language from the Rehabilitation Act. See Haw. Rev. Stat. Ann. § 368-1.5(a) (1990); La. Rev. Stat. Ann. § 46:2254 (1990); Mass. Gen. Laws Ann. Const. Amend. CXIV (1990); Va. Code Ann. § 51.5-40 (1990). We note that courts in these states, like this court, could interpret such language to require reasonable modification, so the lack of a specific

3. Remedies

The remedies available under state law for violations of state accessibility requirements in the provision of state services were substantially more limited than the remedies available under Title II. Of the twenty-four states that did provide statutory protection against disability discrimination in the provision of state services, six failed to provide for damages as a remedy for violations by the state (even to remedy and deter intentional discrimination),[40] and another five significantly limited such damages.[41] Eight of the twenty-four states that covered services, eight did not allow successful plaintiffs to obtain attorney's fees for claims

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statutory requirement may be less troubling in those states. See *Alexander v. Choate*, 469 U.S. 287, 300 (1985) (construing statute to mean that "while a grantee need not be required to make 'fundamental' or 'substantial' modifications to accommodate the handicapped, it may be required to make 'reasonable' ones").

[40] Colo. Rev. Stat. Ann. §§ 24-34-306, 24-34-605 (1990) (no compensatory relief); Conn. Gen. Stat. Ann. § 46a-99 (1990) (no compensatory relief); Haw. Rev. Stat. Ann. § 489-7.5 (1990) (provision allowing private right of action not effective until 1991); N.C. Gen. Stat. § 168A-11(b) (1990) (no damages); Okla. Stat. tit. 25 § 1402 (1990) (no compensatory relief); S.D. Codified Laws § 20-13-23 (1990).

[41] Kan. Stat. Ann. § 44-1005(k) (1990) (limited damages for pain suffering and humiliation to $2,000); Nev. Rev. Stat. Ann. § 651.090(1) (1991) (see historical notes in the 1991 database) (Section 41.035 (1991) imposes a $50,000 limit on tort damages against state and state employees); S.C. Code Ann. § 43-33-540 (1990) (limits actual damages to $5,000); Va. Code Ann. § 51.5-46A (1990) (no damages for pain and suffering); W. Va. Code Ann. §§ 5-11-13(c), 5-11-10 (1991) (see historical notes in 1991 database) (while compensatory damages are available in court, a complainant in an administrative proceeding could only receive incidental compensatory damages, the modern equivalent of $1,000 in 1977).

involving services.[42] Thus, Congress enacted the ADA, and Title II in particular, against a backdrop of ineffectual state law remedies.

IV. Invalidating Title II of the ADA Would Severely Undermine the Protections Currently Afforded to Persons with Disabilities in a Majority of States.

As we have seen, "only a minority of states actually have statutory protection against disability discrimination * * * similar to that found in ADA Title II."[43]

State definitions of disability continue to fall short of the ADA, resulting in far less protection under the state statutes. While eight states broadened their definition of disability to cover at least some persons with mental impairments,[44] and ten states have done so to include those

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[42] See Colo. Rev. Stat. Ann. §§ 24-34-605; 24-34-306 (1990); Conn. Gen. Stat. Ann. § 46a-99 (1990) (relief provision does not include attorney's fees); Kan. Stat. Ann. § 44-1005 (1990) (same); Haw. Rev. Stat. Ann. § 489-7.5 (1990) (provision allowing attorney's fees not effective until 1991);); Okla. Stat. tit. 25 § 1402 (1990) (relief provision does not include attorney's fees); Pennsylvania (section in current law allowing attorney's fees, see Pa. Stat. Ann. tit. 43, § 962(c.2) (2005), was added in 1991); R.I. Gen. Laws § 42-87-4 (1990); S.D. Codified Laws § 20-13-24 (1990) (no attorney's fees provision).

[43] Ruth Colker and Adam Milani, *The Post-Garrett World: Insufficient State Protection Against Disability Discrimination*, 53 Ala. L. Rev. 1075, 1113 (2002).

[44] Ariz. Rev. Stat. Ann. § 41-1492 (2005); Cal. Gov't Code § 12926 (2005); Del. Code Ann. tit. 6, § 4502 (2005); Kan. Stat. Ann. § 44-1002 (2005); Ky. Rev. Stat. Ann. § 344.010 (2005); N.H. Rev. Stat. Ann.

with a record of impairment or who are regarded as having an impairment,[45] over twenty states still have definitions of disability more limited than the ADA.

Statutes governing access to facilities remain inadequate in the majority of states. While six states have revised their statutes to allow damage suits against the state for failing to provide access to facilities,[46] none of the states that prohibited or limited such damages have abandoned these restrictions. Of the seven states that allowed a private right of action for damages but did not allow attorney's fees, only Pennsylvania has adopted such a provision.[47] Finally, none of the states that failed to require accessibility to all state facilities in 1990 has added such a requirement.

Lastly, state laws pertaining to services remain inadequate today. Since 1990 only four states—Kentucky,

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§ 354-A:2 (2005); Nev. Rev. Stat. Ann. § 651.050 (2005); Wis. Stat. Ann. § 106.52(c) (2005).

[45] Ariz. Rev. Stat. Ann. § 41-1492 (2005); Cal. Gov't Code § 12926 (2005); Kan. Stat. Ann. § 44-1002 (2005); Ky. Rev. Stat. Ann. § 344.010 (2005); Me. Rev. Stat. Ann. tit. 5, § 4553 (2005); Mo. Rev. Stat. § 213.010 (2005); Mont. Code Ann. § 49-2-101 (2005); Nev. Rev. Stat. Ann. § 651.050 (2005); Pa. Stat. Ann. tit. 43, § 954 (2005); Wis. Stat. Ann. § 106.52(c) (2005).

[46] See Ariz. Rev. Stat. Ann. § 41-1492.09 [B] (2005); Haw. Rev. Stat. Ann. § 489-7.5(a)(1) (2005); Ind. Code Ann. §§ 22-9-8-1, -3 (2005); N.D. Cent. Code § 14-02.4-20 (2005), and *State v. Haskell*, 621 N.W.2d 358, 360 (N.D. 2001) (finding damages are available under § 14-02.4-20); N.H. Rev. Stat. Ann. § 354-A:21 (2005); S.D. Codified Laws § 20-13-35.1 (2005).

[47] See Pa. Stat. Ann. tit. 43, § 962(c.2) (2005).

Maine, North Dakota and Vermont—have added statutes that prohibit the state from discriminating in the provision of its services.[48] Of the six states which covered state services but did not provide a private right of action for damages, only Hawaii and South Dakota have revised their statutes to allow such relief.[49]

The inadequacy of current state law may be most pronounced in the prison context, where prisoners currently receive even less protections under state statutes. For example, in *Doe v. Michigan Department of Corrections*, 601 N.W.2d 696 (Mich. Ct. App. 1999), the Michigan Court held that the Michigan Persons with Disabilities Civil Rights Act, Mich. Stat. Ann. § 37.1101, applied to prison inmates. This act provided that "a person shall not deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation or a public service because of a disability." Mich. St. Ann. § 37.2101 (1999). In direct response to this holding, the Michigan legislature amended the state's anti-discrimination provisions to specifically provide that "a public service *does not include a state or county correctional facility with respect to an individual serving a sentence of imprisonment.*" *Id.* (emphasis added). Thus, Michigan law currently provides *no redress* to

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[48] Ky. Rev. Stat. Ann. §§ 344.120, 344.130 (2005); Me. Rev. Stat. Ann. tit. 5, §§ 4592, 4553 (2005); N.D. Cent. Code §§ 14-02.4-14, 14-02.4-15 (2005); Vt. Stat. Ann. tit. 9, §§ 4502(c), 4501(1) (2005).

[49] Haw. Rev. Stat. Ann. § 489-7.5 (2005) (effective in 1991), S.D. Codified Laws § 20-13-35.1 (2005).

incarcerated individuals with disabilities. *See Doe v. Dep't of Corr.*, 641 N.W. 2d 269 (Mich. Ct. App. 2002).

Similarly, at least one Maine court has held that its state prisons are not a "'place of accommodation' so that the [Maine Human Rights Act] might apply to the services and facilities it offers its inmates." *Napier v. State*, No. CV-00-042, 2002 WL 32068249, at *8 (Me. Super. Nov. 18, 2002). And in Georgia, the state Attorney General has construed the state disability law, Ga. Code. Ann. § 30-3-2 (2005), to exclude jail cells. 1984 Op. Atty. Gen. Ga. 84-61 (September 6, 1984).

The need for Title II of the ADA is as real now as it was in 1990. There can be no assurance that the state legislatures, which have made little progress since 1990, would rectify the deficiencies in their laws if this Court were to limit the scope of Title II as applied to the states.

CONCLUSION

For the reasons set forth in the Briefs for Petitioners and above, this Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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UNITED STATES OF AMERICA,

Petitioner,

v.

STATE OF GEORGIA, *et al.*,

Respondents.

TONY GOODMAN,

Petitioner,

v.

STATE OF GEORGIA, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF *AMICI CURIAE* THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM, PEOPLE FOR THE AMERICAN WAY FOUNDATION & THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether, and to what extent, Title II of the American with Disabilities Act of 1990, 42 U.S.C. §§ 12131-12165 (2002), validly abrogates state sovereign immunity for suits by prisoners with disabilities challenging discrimination by state-operated prisons?

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INTEREST OF *AMICI CURIAE*[1]

The Lawyers' Committee for Civil Rights Under Law (the "Lawyers' Committee"), National Asian Pacific American Legal Consortium ("NAPALC"), People for the American Way Foundation ("People For") and The National Association for the Advancement of Colored People ("NAACP") are nonprofit organizations dedicated, among other goals, to eradicating discrimination affecting racial, and ethnic minorities, women, and other targeted populations. *Amici* have worked closely with Congress to advance legislation on the issue of discrimination. Many of the *amici* represent victims of discrimination who will be adversely affected by any restriction on the power of Congress to legislate in an effort to fight discrimination. For *amici*, expanding the reach of the Eleventh Amendment and curtailing Congress' powers under § 5 signifies a threat to the ability of its constituencies to seek redress for violations of their federally protected civil rights. Accordingly, the following *amici*, with the consent of the Parties, submit this Brief in support of Petitioner's argument that 42 U.S.C. §§ 12131-12132, Title II of the Americans With Disabilities Act, was validly enacted pursuant to the power of Congress under § 5 of the Fourteenth Amendment.

The Lawyers' Committee was formed in 1963 at the request of President Kennedy to involve private attorneys in the effort to insure the civil rights of all Americans. The Lawyers' Committee has been involved as *amicus curiae* or counsel in several cases before the Court involving the scope of Congress' legislative power. *See, e.g., Tennes*see v. *Lane*,

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1. Counsel for *amici curiae* authored this brief in its entirety. No person or entity other than *amici curiae*, their staff, or their counsel made monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

541 U.S. 509 (2004); *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S.721 (2003); *Medical Bd. of California* v. *Hason*, 537 U.S. 1028 (2002), *cert. dismissed*, 123 S. Ct. 1779 (2003); *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103 (2001); *Lopez* v. *Monterey County*, 525 U.S. 266 (1999).

The NAPALC is a national non-profit, non-partisan organization whose mission is to advance the legal and civil rights of Asian Americans. Collectively, NAPALC and its Affiliates, the Asian American Institute, the Asian Law Caucus, and the Asian Pacific American Legal Center, have over 50 years of experience in providing legal public policy advocacy and community education on discrimination issues. NAPALC was an *amici* in support of respondents in *Tennessee* v. *Lane*, 541 U.S. 509 (2004) and likewise the question presented by this case is of great interest to NAPALC because it implicates the availability of civil rights protections for Asian Americans in this country.

People For is a nonpartisan citizens' organization established to promote and protect civil and constitutional rights. People For has supported the Americans with Disabilities Act of 1990, and joins this brief to help vindicate Congress' power under § 5 of the Fourteenth Amendment and its ability to protect individuals with disabilities against discrimination by states and state agencies. People For has also been involved as *amicus curiae* in other briefs on this issue, including *Tennessee* v. *Lane*, 541 U.S. 509 (2004).

The NAACP is a non-profit corporation founded in 1909 and seeks to ensure the political, educational, social and economic equality for all persons and to eliminate racial hatred and discrimination. The NAACP supports the rights guaranteed by the Fourteenth Amendment and Congress' broad powers under § 5 of that Amendment to pass legislation that in certain circumstances abrogates state sovereignty immunity.

STATEMENT OF THE CASE

In 1995, Petitioner Tony Goodman, a paraplegic who uses a wheelchair, was incarcerated in the Georgia State Prison (GSP), where he was confined to a cell measuring twelve feet long by three feet wide. The size of the cell prevented him from turning his wheelchair, rendering him effectively immobile for twenty-three to twenty-four hours a day. Mr. Goodman's placement in the twelve by three cell was unrelated to any penological justification. Because the prison did not have accommodations to allow Mr. Goodman access to prison facilities, Mr. Goodman could not use the GSP chapel or law library, and was excluded from the benefits of GSP's educational services, including vocational training, college programs, and recreational activities.

GSP lacks wheelchair-accessible routes or rooms, has no transportation facilities equipped for inmates with disabilities, and lacks facilities for disabled inmates to perform daily functions, including personal grooming, hygiene, and drinking. Because the toilet and showers are without support bars, Mr. Goodman was unable to use them without assistance. As a result, Mr. Goodman was forced to sit in his own bodily waste for long periods of time and suffered repeated, severe injuries when he attempted to use the toilet. Mr. Goodman repeatedly requested accommodations so that he could use these and other prison facilities. His requests were denied.

In addition to the lack of reasonable accommodations for his paraplegia, GSP also denied Mr. Goodman adequate medical care following his injuries, which included an epileptic seizure, a broken right toe, a crushed right knee, and injuries to his left arm, head, neck, back, stomach, and legs. Prison officials also excluded him from appropriate medical care, counseling services, and rehabilitative services.

Mr. Goodman filed this federal action alleging Eighth Amendment violations under § 1983 and unlawful disability discrimination under Title II of the Americans with Disabilities Act of 1990 ("ADA"), as amended, 42 U.S.C. § 12131, *et seq.* ("Title II"). The District Court, adopting the recommendations of a magistrate, dismissed his § 1983 claim but allowed his Title II claims to proceed. The magistrate judge thereafter granted summary judgment on Mr. Goodman's Title II claims. Mr. Goodman appealed, and the United States intervened to defend the constitutionality of Title II's abrogation of the state's Eleventh Amendment immunity. While the appeal was pending, this Court rendered its decision in *Tennessee* v. *Lane*, 541 U.S. 509, 124 S. Ct. 1978 (2004). The Eleventh Circuit reversed the dismissal of Mr. Goodman's Eighth Amendment claim and affirmed the dismissal of Mr. Goodman's Title II claims for monetary damages on Eleventh amendment grounds, relying, without discussion, on its decision in *Miller* v. *King*, 384 F.3d 1248 (2004), which held that "Title II, as applied to prisons, would substantively and materially rewrite the Eighth Amendment." *Miller*, 384 F.3d at 1273. Thereafter, this Court granted Petitioner's request for a writ of certiorari.

SUMMARY OF ARGUMENT

Pursuant to its power to enforce § 5 of the Fourteenth Amendment, Congress purposefully abrogated the states' Eleventh Amendment immunity when it enacted Title II. Congress recognized and sought to address the pervasive and widespread violations of the due process and equal protection rights of individuals with disabilities by the states. Title II operates to provide individuals with disabilities access to the courts, to protect them from cruel and unusual punishment, and to enable them to participate fully in educational and other government programs. Because these important constitutional rights were at stake, Congress had

wide latitude to construct legislation to remedy existing state discrimination against individuals with disabilities and to prevent further discrimination.

Under the congruence and proportionality test used in *Lane* and *Garrett*, Title II's abrogation of the states' Eleventh Amendment immunity is valid. First, as recognized in *Lane*, the legislative history behind Title II is compelling, well-defined, and explicit, and includes findings involving discrimination against prisoners with disabilities.

Second, the scope of Title II is no broader than necessary to achieve its critical purposes. As the Court instructed in *City of Boerne* v. *Flores*, 521 U.S. 507, 530 (1997), "[t]he appropriateness of remedial measures must be considered in light of the evil presented." The scope of permissible remedial measures is broadened here, because the discrimination Congress and the Executive addressed in enacting Title II includes the exercise of fundamental rights. Congress acted in response to a widespread pattern of discrimination by states against individuals with disabilities. Congress tailored Title II to remedy these specific constitutional violations, providing a series of measures designed to blunt the impact Title II compliance would have on the states. Title II therefore meets the congruence and proportionality test.

Under the more deferential legitimate penological purpose standard set forth in *Turner* v. *Safley*, 482 U.S. 78, 89 (1987), GSP can offer no legitimate penological purpose for its refusal to provide prisoners with disabilities reasonable access to prison facilities such as the law library and the chapel. Questions of cost – the most likely justification are more appropriately addressed in the application of the ADA's reasonable-accommodations test to particular circumstances than in the analysis of Congress' power under § 5. Both Title II itself and the implementing regulations take cost into

account, and provide that a state need not make fundamental alterations to its programs.

When Congress acts to protect such fundamental rights as access to courts, a congruence and proportionality test incorporating rational basis review – as was applied in *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62 (2000), *City of Boerne* and *Board of Trustees of the University of Alabama* v. *Garrett*, 531 U.S. 356 (2001) – is an inappropriate measure of Congress' constitutional authority. *See Nevada Dep't of Human Resources* v. *Hibbs*, 538 U.S. 721, 736-37 (2003) (acknowledging that Congress has broad discretion to legislate to enforce constitutional principles that invoke a heightened level of scrutiny of state conduct). Instead, as it historically has done with legislation enacted to remedy the effects of discrimination invoking heightened scrutiny, the Court should apply the deferential rational means test derived from *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), and applied in cases such as *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966) (upholding Voting Rights Act of 1965).

While *amici* submit that Title II passes the congruence and proportionality test in its applications to prisons, *amici* do not endorse that test as proper for review of *any* legislation. For the reasons discussed in dissenting opinions in *Garrett* and *Kimel*, *amici* respectfully submit that this standard is premised on an unworkable view of the legislative process, effectively requires Congress to alter the way in which it legislates, and threatens to violate separation of powers principles by imposing judicial requirements upon Congress' legislative procedure. *Amici*, therefore, respectfully urge the Court to return to its prior rational means standard derived from *M'Culloch*.

ARGUMENT

I. TITLE II OF THE ADA GUARANTEES THE FUNDAMENTAL RIGHTS AND LIBERTIES OF INDIVIDUALS WITH DISABILITIES.

Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity or be subjected to discrimination by any such entity." 42 U.S.C. § 12132 (2003). In enacting Title II, Congress sought to correct and prevent the unequal treatment of persons with disabilities by requiring states and other public entities to make "reasonable modifications" to their services and programs, so as to render them accessible. 42 U.S.C. § 12131(2). In affirming the constitutionality of Title II in *Lane*, this Court recognized the systemic discrimination faced by individuals with disabilities in access to public programs: "Congress enacted Title II against the backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights." *Lane*, 541 U.S. at 524. The unequal treatment cited in *Lane* was not confined to historical offenses against human dignity such as forced sterilization, but persisted, as Congress found, "in such critical areas as . . . *institutionalization*," 42 U.S.C. § 12101(a)(3), a finding this Court has noted "can be thought to include penal institutions." *Pennsylvania Dept. of Corrections* v. *Yeskey*, 524 U.S. 206, 211 (1998).

Title II's requirement of reasonable modifications is designed to prevent deprivations of federal constitutional rights, not only in circumstances where the state's differential treatment of persons with disabilities amounts to irrational discrimination, but also where the inaccessibility of state services or programs impinges on a fundamental right

guaranteed by the Fourteenth Amendment. *Lane*, 541 U.S. at 522. The Due Process Clause incorporates and applies to the states most of the constitutional limits on governmental action embodied in the First, Fourth, Fifth, Sixth, and Eighth Amendments. *See Duncan* v. *Louisiana*, 391 U.S. 145, 148 (1968) (articulating the doctrine of incorporation).

This Court has "insisted that prisoners be accorded those rights not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration." *Hudson* v. *Palmer*, 468 U.S. 517, 523 (1984). As in *Lane*, the allegations in the present case involve fundamental constitutional rights. Mr. Goodman claims that he was denied access to the law library and to the chapel, that his conditions of confinement amount to cruel and unusual punishment, and that prison officials were deliberately indifferent to his serious medical needs. These allegations implicate the right of access to the courts considered in *Lane*, see *Lewis* v. *Casey*, 518 U.S. 343 (1996) (confirming that the right of reasonable access to legal materials is a part of the right of access to the courts), as well as rights protected under the First Amendment, *See Cruz* v. *Beto*, 405 U.S. 319 (1972) (holding that prisoners have a First Amendment right to "reasonable opportunities" to practice their religion while incarcerated) and the Eighth Amendment, *see Estelle* v. *Gamble*, 429 U.S. 97, 106 (1976) (holding that the deliberate indifference of state custodial officials to an inmate's serious medical need violates the Eighth Amendment).[2] As this Court's precedents

2. Mr. Goodman also claims that these deprivations occurred as a result of his transfer to GSP from the medical prison. A transfer to significantly more adverse conditions of confinement may also implicate procedural due process. *See Wilkinson* v. *Austin*, 125 S.Ct. 2384, 2387 (2005) (holding that a liberty interest protected by the Due Process Clause may be created by a transfer that "'imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.'" (quoting *Sandin* v. *Conner*, 515 U.S. 472, 484 (1995)).

show, these rights are not fundamentally inconsistent or incompatible with incarceration. It was against this backdrop of pre-existing constitutional protections that Congress enacted Title II.

II. UNDER THE ANALYSIS SET FORTH IN *LANE*, TITLE II IS APPROPRIATE LEGISLATION UNDER § 5 OF THE FOURTEENTH AMENDMENT.

Title II is a congruent and proportional response to the states' documented history of discrimination against individuals with disabilities. Under the framework set out in *Boerne* and clarified in *Lane*, after determining that Congress unequivocally expressed its intent to abrogate the states' immunity, a court turns to whether Congress properly exercised its power to abrogate.[3] To answer this question, the Court must first "identify the constitutional right or rights that Congress sought to enforce when it enacted Title II," *Lane*, 541 U.S. at 521, by reference to the historical experience reflected by Title II. Next, the Court must determine whether the legislation is congruent and proportional to the wrong identified by Congress.

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3. The first step of this analysis questions whether Congress explicitly expressed its intent to abrogate the states' Eleventh Amendment immunity. *See Lane*, 541 U.S. at 517; *Kimel*, 528 U.S. at 73; *Seminole Tribe* v. *Florida*, 517 U.S. 44, 55 (1996) The Act specifically provides that the states are not immune from suit under the Eleventh Amendment for violations of the ADA. 42 U.S.C. § 12202 ("A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter.").

A. Title II Is Intended to Guarantee Individuals with Disabilities Equal Opportunity to Obtain Vital Services and to Exercise Fundamental Rights and Liberties.

In accordance with *Lane*, it is first important to "identify the constitutional right or rights that Congress sought to enforce when it enacted Title II." *Lane*, 541 U.S. at 521. As discussed in Part I above, Title II is intended to prohibit and remedy the infringement by the government of the fundamental rights and liberties of individuals vith disabilities. These fundamental rights and liberties, which frequently intersect with the right to equal protection, include the rights involved in this case: the right of access to the courts; the right to freely exercise one's religious beliefs; and the right to be free from cruel and unusual punishment. *Lane*'s holding that Title II is proper § 5 legislation as it applies "to the class of cases implicating the accessibility of judicial services, *Lane* 541 U.S. at 511, is fully applicable to Mr. Goodman's case. Indeed, discrimination such as a state's refusal to provide meaningful access to the courts for individuals with disabilities, a right implicated by Georgia prison officials' refusal to provide reasonable access to GSP's law library, is presumptively unconstitutional under the Due Process Clause and the Equal Protection Clause.

Title II also helps safeguard the equal-protection rights of persons with disabilities, including equal access to governmental processes such as the court system. "Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance." *Romer* v. *Evans*, 517 U.S. 620, 633 (1996). Thus, while Congress' power to enact Title II and to abrogate the states' Eleventh Amendment Immunity was rooted in its authority to enforce

the Due Process Clause of the Fourteenth Amendment, Congress also recognized that Title II would protect the equal protection rights of individuals with disabilities.

Central to this case are deprivations of Eighth Amendment rights resulting from inhumane conditions of confinement. Of all Mr. Goodman's claims, these most poignantly illustrate the disparate burdens that the unyielding application of prison rules can inflict on persons with disabilities. Because of the size and configuration of his cell and the absence of other reasonable accommodations, Mr. Goodman is forced to sit in the same position, facing the same direction, for twenty-three to twenty-four hours a day, without access to windows, in a cell that lacks a toilet he can safely use. *Amici* submit that no state today would think it constitutionally acceptable to confine its able-bodied inmates for all or almost all of every day in cells whose size and configuration prevent them from even turning around, without adequate facilities for disposing of bodily wastes. Yet without enforcement of Title II's requirement that prisons provide reasonable accommodations for his disability, these are the conditions in which Mr. Goodman lives. As this Court has held, Title II protects state prisoners against discrimination suffered by reason of a disability. *Yeskey*, 524 U.S. 206. This protection is, in part, an expression of the "broad and idealistic concepts of dignity, civilized standards, humanity, and decency" embodied in the Eighth Amendment. *Gamble*, 429 U.S. at 101.

Consistent with this Court's long-held doctrine that legislation passed to enforce the Fourteenth Amendment may cover "a somewhat broader swath of conduct" than the Amendment itself does, *Garrett*, 531 U.S. at 364, Title II's remedial scheme plainly bars states from treating people irrationally and protects them from infringing fundamental rights. It does not, however, change the contours of existing

constitutional law by requiring courts to apply a legal standard that is inconsistent with this Court's decisions and therefore does not work a "substantive change in constitutional protections." *Cf. City of Boerne*, 521 U.S. at 529. Instead, it merely requires states to administer their programs and services in â manner that reasonably accommodates those persons who, because of a disability, stand at a disadvantage in exercising or defending their rights.

B. Congress Supported Title II With Specific Findings Concerning the Pervasiveness of State Discrimination Against Individuals with Disabilities in the Provision of Programs and Services.

As recognized by the Court in *Lane*, Congress supported Title II with specific findings of the pervasiveness of discrimination against individuals with disabilities. 541 U.S. at 516. The strength of this legislative history is evidenced by Congress' specific findings of persistent discrimination in the provision of public services and accommodations. 42 U.S.C. § 12101(a)(3), (5)–(9).

Congress' finding that individuals with disabilities "occupy an inferior status in our society and are severely disadvantaged socially, vocationally, economically, and educationally" rings true for disabled prisoners just as much as it does for those for whom freedom of mobility and access to public services are more varied. 42 U.S.C. § 12101(a)(7). Indeed, "the text of the ADA provides no basis for distinguishing [prison] programs, services, and activities from those provided by public entities that are not prisons." *Yeskey*, 524 U.S. at 209-10. And references to unequal treatment of disabled prisoners appear in the legislative record cited approvingly in *Lane*.[4] Title II's

4 These incidents include a failure to provide medical and psychiatric treatment; a failure to provide interpretive services for deaf prisoners; and abuse of prisoners with disabilities. *See Garrett*, 531 U.S. at 372 n. 7 and App. C.

protections take on a special significance in the penal context, where an individual is entirely within the custody of the state and is entirely dependent on the state for access to services. The Congressional findings supporting Title II have special weight in the penal context, where all "services, programs, or activities," 42 U.S.C. § 12132, are controlled by the state.

This conclusion is bolstered by the goals Congress sought to achieve in enacting Title II, which include providing "clear, strong, consistent, enforceable standards," 42 U.S.C. §12101(b)(2), and addressing "the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. § 12101(b)(4). Prison officials affect the day-to-day lives of disabled prisoners in the provision of various benefits, services, programs, and activities, including educational services, recreational services, health services, public accommodations, and transportation, *see Yeskey*, 524 U.S. at 210 (noting that modern prisons provide inmates with many recreational activities, medical services, and educational and vocational programs).

As demonstrated by Mr. Goodman's inability to access vital prison facilities and services, including those that represent the state-provided means of exercising fundamental rights, the protections embodied by Title II are perhaps no where as crucial as in prison, where "the government's power is at its apex," *Johnson* v. *California*, 125 S.Ct. 1141,1149-50 (2005), and where an individual's access to public services, programs, and activities is wholly within the control of state officials.

C. The Substantive and Remedial Provisions of Title II are Proportional and Congruent to the Rights Protected by the Legislation.

Because Congress has "wide latitude" in defining the bounds of § 5 through prophylactic and remedial legislation, *City of Boerne*, 521 U.S. at 520, the congruence and proportionality analysis does not require an exact match between legislative and constitutional prohibitions. Rather, as noted in *Kimel*, the affirmative grant of legislative power contained in § 5 of the Fourteenth Amendment permits Congress to "remedy and deter" unconstitutional acts that violate § 5, as well as "prohibit[ ] a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Kimel*, 528 U.S. at 81 (citing *City of Boerne*, 521 U.S. at 518).

This Court recently reaffirmed this principle in *Lane*. 541 U.S. at 518; *see also Hibbs*, 538 U.S. at 727-28 (holding that the abrogation of states' Eleventh Amendment immunity by the FMLA was a valid act of Congress under § 5 of the Fourteenth Amendment). As noted in *Lane*, as long as Congress does not attempt to redefine the obligations of the states, Congress may exercise its § 5 power to "enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct." 541 U.S. at 518 (citing *Hibbs*, 538 U.S. at 727-28). Accordingly, "legislation which 'deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional.'" *Hibbs*, 538 U.S. at 730 (quoting *City of Boerne*, 521 U.S. at 518).

Title II is congruent and proportional to the evils identified by Congress because it is tailored to remedy these constitutional violations while placing the least burden

possible on states. The appropriateness of Title II should be examined in light of the injuries that Congress was seeking to remedy and prevent. *City of Boerne*, 521 U.S. at 530. As noted, the injuries include the infringement of fundamental rights and liberties guaranteed by the United States Constitution as well as irrational discrimination violative of the Equal Protection Clause. Congress enacted Title II to ensure that individuals with disabilities would not continue to face such discriminatory treatment. Mindful of the burdens a strict requirement of accommodation might impose, however, Congress allowed public entities considerable flexibility in complying with the statute's moderate demands. This is made clear in the statute itself, in the implementing regulations, and in the decisions of this Court interpreting Title II.

In order to comply with Title II, a state need only make "reasonable modifications in policies, practices, and procedures" that do not "fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7); *see also* 42 U.S.C. § 12131(2) (defining "qualified individual with a disability" as an individual "who, with or without *reasonable* modifications . . . , meets the essential eligibility requirements for the receipt of services") (emphasis added); *Olmstead* v. *Zimring*, 527 U.S. 581, 606 n.16 (1999) (making clear that Title II does not require fundamental alterations in state programs).

Title II's implementing regulations, to which this Court resorted for guidance in *Olmstead*, 527 U.S. at 598, and to which this Court should defer in interpreting the statute, *cf. Bragdon* v. *Abbott*, 524 U.S. 624, 646 (1998) (giving *Chevron* deference to Justice Department regulations implementing the public-accommodation provisions of Title III of the ADA), merely require a public entity to ensure that "when viewed in its entirety, [it] is readily accessible to and usable

by individuals with disabilities." 28 C.F.R. § 35.150(a). This accessibility mandate does not "[n]ecessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities." *Id.* § 35.150(a)(2). In the case of facilities built before 1992, for which structural change is likely to be difficult, a public entity may comply with Title II by adopting a variety of less costly measures, including relocating services to alternative, accessible sites and assigning aides to assist persons with disabilities in accessing services. 28 C.F.R. § 35.150(b)(1). In the prison context, this may mean making modifications to a small number of prison cells or taking other steps to ensure that prisoners with disabilities have access to vital prison facilities and programs. The implementing regulations explicitly do not require a state to take any steps that would "result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens." *Id.* § 35.150(a)(3); *see also* 28 C.F.R. §§ 35.130(b)(7), 35.164;

Title II is thus proportional and congruent. It is designed to protect the fundamental rights and liberties of individuals with disabilities; yet it does not require any unreasonable modifications or any fundamental alteration of state programs to achieve that goal. The obligations it imposes on the states are limited, and the states are permitted a great deal of flexibility in meeting them. Therefore, Congress acted within its power to abrogate the Eleventh Amendment immunity of the states.

This result is not altered by the standard of review applicable to some claims of constitutional deprivations in prison. It is well settled that state discrimination implicating fundamental rights and liberties is ordinarily subject to strict scrutiny, *see Harper* v. *Virginia Bd. Of Elections*, 383 U.S. 663, 670 (1996), and must be justified with a compelling

state interest. *See Zablocki* v. *Redhail*, 434 U.S. 374 (1978) (right to marry); *Stanley* v. *Illinois*, 405 U.S. 645 (1972) (right to custody of one's children); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969) (right to travel); *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663 (1966) (right to vote); *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942) (right to procreate). This Court has consistently affirmed the principle that "federal courts must take cognizance of the valid constitutional claims of prison inmates." *Turner*, 482 U.S. at 84. Because prisoners retain their constitutional rights inside prison, "[w]hen a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights." *Procunier* v. *Martinez*, 416 U.S. 396, 405- 06 (1974); *see also Pell* v. *Procunier*, 417 U.S. 817, 822 (1974) ("[A] prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system."). Nevertheless, this Court has on occasion upheld prison regulations impinging upon certain fundamental rights of prisoners upon a showing that they bear a reasonable relationship to a legitimate penological purpose. *Turner* v. *Safley*, 482 U.S. 78, 89 (1987); *but see Johnson* v. *California*, 125 S.Ct. 1141 (2005) (holding that strict scrutiny, not the more deferential reasonable penological purpose standard, is the appropriate standard to review a prison's practice of racially segregating prisoners).

This more deferential measure of constitutionality has its basis in the understanding that prison policy is "a task that has been committed to the responsibility of th[e] [legislative and executive] branches, and separation of powers concerns counsel a policy of judicial restraint." 482 U.S. at 85. But this Court has applied the *Turner* standard "*only* to rights that are 'inconsistent with proper incarceration.'" *Johnson*, 125 S.Ct. at 1149 (emphasis in original) (citing *Overton* v. *Bazzetta*, 539 U.S. 126, 131

(2003)). While prisoners necessarily suffer some limitations in their use of the court system, *Lewis* v. *Casey*, 518 U.S. 343 (1996), and in the exercise of their religious rights, *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342 (1987), it cannot be "inconsistent with proper incarceration" to afford prisoners reasonable and equal access to an established prison law library or a prison chapel, where no penological purpose stands in the way.

In any event, the deferential *Turner* standard is entirely inapplicable to Mr. Goodman's Eighth Amendment claim. *See Johnson*, 125 S.Ct. at 1149 ("[W]e have not used *Turner* to evaluate Eighth Amendment claims of cruel and unusual punishment in prison."). Instead, violations of the Eighth Amendment are reviewed using the "deliberate indifference" standard, under which the court determines whether prison officials demonstrated deliberate indifference to the inmates' health or safety. *See Hope* v. *Pelzer*, 536 U.S. 730, 738 (2002) (inmate subjected to cruel and unusual punishment when prison guards handcuffed him to hitching post for disruptive behavior). Judged by that standard, GSP's actions in refusing to provide Mr. Goodman with medical care after he sustained serious injuries and in forcing him to sit in his own bodily waste for long periods of time constitute deliberate indifference. *See Gamble*, 429 U.S. at 104-05 (1996) ("[D]eliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' proscribed by the Eighth Amendment.) (internal citations omitted).

Even as to the rights to which it applies, the *Turner* standard should not be thought to imply a limit on Congress' enforcement power under Section Five of the Fourteenth Amendment, as the rational-basis test was held to do in *Garrett*. In *Garrett*, an insufficient legislative record of state employment discrimination against individuals with

disabilities supported Title I of the ADA. But *Lane* settled that question in the context of Title II, concluding that the "sheer volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities in the provision of public services" supported Congress' chosen remedy. 541 U.S. at 528. The strength of this record gives Congress more latitude in fashioning a proportionate legislative response to remedy these violations.

It would be ironic indeed if the constitutional test set forth in *Turner*, adopted by this Court out of deference to the judgments of the political branches regarding the management of prisons, were to have the unintended doctrinal consequence of reducing this Court's deference to those branches in relation to the protection of the rights of disabled prisoners. It cannot be the law that this Court defers to the political branches only when they act to infringe prisoners' fundamental rights as in *Turner*, but not when they act to protect those rights under § 5 of the Fourteenth Amendment. When Congress acts to protect constitutional rights of prisoners under § 5, it must be presumed to have taken the realities of the penal system into account, and this Court should defer to its judgment on that point.

III. THE RIGOROUS STANDARD OF REVIEW RECENTLY APPLIED TO § 5 LEGISLATION SHOULD BE ABANDONED BECAUSE IT UNDULY COMPROMISES CONGRESSIONAL POWER.

Prior to its 1997 decision in *City of Boerne*, when reviewing § 5 legislation this Court applied a rational means test derived from *M'Culloch* v. *Maryland*. The *M'Culloch* standard requires only a rational relationship between the ends of the legislation and Congress' chosen means. In the words of Chief Justice Marshall:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist[ent] with the letter and spirit of the constitution, are constitutional.

M'Culloch, 17 U.S. (4 Wheat.) 316, 421 (emphasis added). The framers of the Fourteenth Amendment echoed this language in authorizing Congress to enforce the Amendment by "appropriate legislation," and this Court glossed their use of that term in *Ex Parte Virginia:*

> Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

100 U.S. 339, 345-46 (1879). The standards articulated in *M'Culloch* and *Ex Parte Virginia* were expressly equated in

Katzenbach v. *Morgan*. As this Court held there: "By including § 5 the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause, Art. I, § 8, cl. 18." 384 U.S. at 650. *See also South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966) (same, as to the Fifteenth Amendment); *James Everard's Breweries* v. *Day*, 265 U.S. 545 (1924) (Eighteenth Amendment).

Under this deferential standard, consistently applied by this Court until 1997, the desirability of the legislation as a policy matter, or the extent to which Congress might have chosen other, more narrowly tailored means, is beyond the scope of the Court's review. All that the Court need determine is whether the legislation is a rational means of enforcing the Fourteenth Amendment's substantive guarantees.

Title II is a rational means of addressing the documented pattern of discrimination by the states against individuals with disabilities. When Congress passed Title II, it was well aware that individuals with disabilities were, among other things, burdened by inaccessible courthouses, inaccessible polling places, inaccessible public transportation, and inaccessible government buildings and agencies. As recognized by the Court in *Lane*, this unequal treatment extends to prisoners with disabilities, who have a long history of being denied reasonable accommodations once incarcerated. *See Lane*, 541 U.S. at 525 n.11. Title II's failure to prevent the type of disparate treatment among prisoners with disabilities that Mr. Goodman has experienced in GSP, *see id.* (citing *LaFaut* v. *Smith*, 834 F.2d 389, 394 (C.A.4 1987) where a paraplegic inmate was unable to access toilet facilities), is testament to the need for such prophylactic legislation in the first instance. *See also Lane*, 541 U.S. at 525 n.11 (citing instances of discrimination faced by

prisoners with disabilities, including a "double amputee forced to crawl around the floor of jail," and a "deaf inmate denied access to sex offender therapy program allegedly required as precondition for parole"). Congress' enactment of Title II is a rational response to this documented history of disparate treatment. Although, as discussed above, Title II is also a congruent and proportional means of addressing discrimination against individuals with disabilities, the Court need not conduct that more exacting analysis. State discrimination affecting a fundamental right is presumptively unconstitutional, and Congress' chosen means of addressing that discrimination need only be rational.

While Title II meets the standard of review employed to determine congruence and proportionality in cases like *Kimel* and *Garrett*, *amici* respectfully urge the Court to return to the traditional, deferential standard used in evaluating the validity of all legislation enacted pursuant to Congress' § 5 powers.

In *City of Boerne* and subsequent cases, the Court has continued to recognize that it should defer to Congress' judgments because "[i]t is for Congress in the first instance to determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Kimel*, 528 U.S. at 80-81 (quoting *City of Boerne*, 521 U.S. at 517). Nevertheless, in applying the congruence and proportionality standard, the Court has closely scrutinized the legislative record for evidence of a "pattern" of unconstitutional state discrimination, has insisted that attempts to deal with such discrimination on a uniform, national basis be supported by evidence in the record, and has questioned the quality of the evidence that is reflected in the record and the inferences that Congress was entitled to draw from it.

Respectfully, *amici* submit that this approach is inconsistent with the principle of separation of powers and unduly intrudes on Congress' legislative function. The Court has noted that

> [a] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data. Only by faithful adherence to this guiding principle . . . is it possible to preserve to the legislative branch its rightful independence and its ability to function.

FCC v. *Beach Communications*, 508 U.S. 307, 308, 315 (1993) (citations omitted). Yet, in determining congruence and proportionality in cases such as *Kimel* and *Garrett*, the Court has required that Congress indicate the "reasons for [its] action" in the legislative record and support those "reasons" with evidence of the necessity of § 5 legislation. *Kimel*, 528 U.S. at 88. The Court thus appears to have imposed an evidentiary standard more appropriate to an administrative agency than a coordinate branch of the Federal Government. *See Garrett*, 531 U.S. at 376 (dissenting opinion of Breyer, J., joined by Stevens, Souter, and Ginsburg, JJ.).

Moreover, the Court appears to have limited the inferences that Congress may draw through the use of common sense from the information it has received from multiple sources. For example, in *Garrett*, the Court held that substantial evidence of society-wide stereotypes concerning individuals with disabilities, and even discrimination by government officials, did not provide a sufficient basis for Congress to infer that state officials were as likely to hold the same stereotypes and prejudices that affected or were likely to affect their treatment of individuals with disabilities. *See id.* at 377-78. And the requirement of a

record showing a pattern of discriminatory state action also implies that Congress' power "to enforce" the Fourteenth Amendment is limited to legislation remedying past conduct that can be reflected in a record and precludes it from legislating prophylactically to protect against incipient or potential conduct that threatens to undermine the guarantees of the Fourteenth Amendment. *See* JOHN T. NOONAN, JR., NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES 93 (2002).

With all respect, *amici* believe that the Court's standard of review in these cases not only violates the separation of powers by imposing judicial requirements upon Congress' legislative procedure, but also reflects an unworkable view of the legislative process and, in effect, calls upon Congress to dramatically alter the way in which it legislates.

First, the Court's apparent requirement that Congress articulate a single, coherent policy rationale and support that rationale with evidence in the legislative record does not accord with the reality of the legislative process. Members of Congress represent constituencies with diverse, often conflicting, interests. Hence, legislation is rarely, if ever, reached through consensus, but rather, through competition and majority vote. *See* Philip P. Frickey & Steven S. Smith, *Judicial Review, The Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 Yale L.J. 1707, 1741-45 (2002). Moreover, legislation is generally the product of a competitive process of bargaining and coalition-building as opposed to the type of deliberation engaged in by judicial and administrative bodies. Accordingly, in many, if not most, cases, no specific, identifiable rationale exists. *See id.* at 1744-45.

In addition, the Court's requirement of an evidentiary predicate in the legislative record mistakenly assumes that

all the information upon which Congress draws in enacting legislation is incorporated in that record. Congress is informed through numerous sources that are not reflected in the legislative record. For example, Members of Congress bring to the legislature the views and experiences of the citizens whom they represent. Thus, unlike a trier of fact in a court or an administrative law judge, Congress is not a "*tabula rasa* until it conducts on-the-record proceedings," but rather, "grounds its claim to legitimacy on knowledge of and accountability to the citizens it represents." A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New "On the Record" Constitutional Review of Federal Statutes*, 86 Cornell L. Rev. 328, 385-86 (2001). In addition, Congress acquires information from, *inter alia*, communications with interest groups, information support services such as the General Accounting Office and the Congressional Research Service of the Library of Congress, written materials from party leadership offices, members' caucuses, legislators' personal staffs, and communications with the executive branch. *See id.* at 384-87; Frickey & Smith, *supra*, at 1734-36.

Among the branches of the Federal Government, Congress is uniquely capable of amassing information from a wide range of sources, both during and outside its formal proceedings. Reliance on the legislative record alone is therefore an incomplete measure of the basis for Congress' judgments. More significantly, however, it appears that if Congress were to satisfy the congruence and proportionality test as applied in cases like *Kimel* and *Garrett*, it must painstakingly catalogue the information acquired from such extra-record sources in the legislative record. For the reasons discussed above, this would mark a dramatic alteration of Congress' legislative procedure.

Furthermore, by requiring Congress to adhere to judicially imposed procedural requirements when it legislates, the Court's application of the congruence and proportionality test conflicts with at least the spirit of a number of constitutional provisions that limit judicial intrusion into the legislative sphere. These include the Rules and Journal Clauses of Article I, which provide, respectively, that "[e]ach House may determine the rules of its proceedings" and "shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy." U.S. Const. art. I, § 5, cls. 2, 3. The Court has interpreted both of these provisions as giving Congress wide discretion to determine how to report and record its consideration of legislation. *See, e.g.*, *United States* v. *Ballin*, 144 U.S. 1 (1892); *Field* v. *Clark*, 143 U.S. 649 (1892).

The more demanding standard of review applied in cases such as *Kimel* and *Garrett* also appears to conflict with the Speech or Debate Clause, which provides that "for any speech or debate in either House, [Senators and Representatives] shall not be questioned in any other place." U.S. Const. art. I, § 6, cl. 1. The Court has determined that one of the Speech or Debate Clause's chief purposes is "to insure that the legislative function the Constitution allocates to Congress may be performed independently" and "reinforc[e] the separation of powers so deliberately established by the Founders." *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 502 (1975). *See also Grave*[l] v. *United States*, 408 U.S. 606, 628-29 (1972) (holding that Speech or Debate Clause prohibited court from inquiring into conduct of, or preparation for, congressional proceeding); Bryant & Simeone, *supra*, at 376-83.

The Court's approach, first articulated in *City of Boerne* and applied in cases like *Kimel* and *Garrett*, reflects two

concerns: first, that in the absence of a judicially recognized history of state discrimination, Congress actually may be seeking to expand the substantive scope of the Fourteenth Amendment or may be adopting a remedy that is disproportionate to the number of instances of unconstitutional state conduct; and second, that in such circumstances, there is a need to protect the sovereignty of the states against unwarranted intrusions by Congress in the guise of enforcing the Fourteenth Amendment. *Amici* respectfully submit that neither concern justifies the intrusion into the legislative process that application of the standard of review in cases like *Kimel* and *Garrett* has entailed.

In the absence of conduct involving a judicially recognized history of unconstitutional state action, this Court has limited itself to rational basis review in evaluating whether state conduct entails arbitrary and purposeful discrimination, in recognition of the Court's own fact-finding limitations and the deference due to democratically elected legislatures. But it is precisely because Congress, as a democratically elected legislature, is not so limited that it is inappropriate to impose a rigorous standard of judicial review on Congress' determination of the existence or a threat of unconstitutional state conduct, even if not previously recognized by the Court. *See Garrett*, 531 U.S. 356, 382-85 (opinion of Breyer, J., dissenting, joined by Stevens, Souter, and Ginsberg, JJ.); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation after* Morrison *and* Kimel, 110 Yale L.J. 441, 467-73 (2000). As discussed above, in making legislative judgments, Congress relies on many sources of information and intuition that would not support a judicial or administrative determination, but which are characteristic of a democratic legislative process. The Fourteenth Amendment expressly assigns to Congress the task of enforcing its guarantees and, under the long tradition established by *M'Culloch*, its

judgment that there exists arbitrary and purposeful state discrimination requiring legislation, and its judgment of what legislation is "appropriate" to enforce the Fourteenth Amendment's guarantees against such discrimination and its effects, deserve deference and respect.

Concerns that Congress may be unjustifiably intruding on state sovereignty do not support a more rigorous standard of review of Congress' legislative judgments under § 5. To begin with, as the Court has recognized, the Civil War Amendments were specifically designed as an expansion of federal power and an intrusion on state sovereignty. *See Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 455-56 (1976) (noting that the Amendments effected "the expansion of Congress' powers with the corresponding diminution of state sovereignty") (discussing *Ex parte Virginia*, 100 U.S. 339, 345-46 (1879)). Moreover, the states are not an isolated minority requiring heightened judicial protection against a tyrannical majority. To the contrary, the political process and the structure of the Federal Government – in particular, the states' equal representation in the Senate – were the principal means intended by the Framers to prevent inappropriate intrusions by the federal legislature on the states' sovereignty. *See Kimel*, 528 U.S. at 93-94 (opinion of Stevens, J., dissenting, joined by Souter, Ginsburg, and Breyer, JJ.); *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550-51 (1985).

The standard recently applied by the Court to determine congruence and proportionality substitutes the Court's views of how Congress should conduct its lawmaking processes in carrying out its duty to "enforce, by appropriate legislation, the provisions of [the Fourteenth Amendment]," U.S. CONST. amend. XIV, § 5, and ultimately substitutes the Court's judgment for that traditionally left to Congress alone as to the "closeness of the relationship between the means [to be]

adopted and the end to be attained." *Burroughs* v. *United States*, 290 U.S. 534, 548 (1934). This is a departure from the Court's historic recognition of its own institutional limitations and the deference due to the democratically elected legislative branch, except in cases where the Court's intervention is needed to protect the rights of individuals guaranteed by the Constitution and those "discrete and insular minorities" who do not have access to the democratic process to protect their rights against a dominant majority. *United States* v. *Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938). Accordingly, for the reasons discussed above, *amici curiae* respectfully urge the Court to reconsider the rigorous standard of review it has recently applied to determine congruence and proportionality, even in cases where the Court has not previously recognized a history of purposeful unequal treatment.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to reverse the decision of the United States Court of Appeals for the Eleventh Circuit.

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In The Supreme Court of the United States

TONY GOODMAN,

Petitioner

v.

STATE OF GEORGIA, *et al.*

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR PETITIONER GOODMAN

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QUESTION PRESENTED

Whether, and to what extent, Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 *et seq.*, validly abrogates state sovereign immunity for suits by inmates with disabilities challenging discrimination by state-operated prisons.

PARTIES TO THE PROCEEDING

Petitioner Tony Goodman brought this civil action against the State of Georgia and the Georgia Department of Corrections, as well as J. Wayne Garner, A.G. Thomas, Johnny Sikes, J. Brady, O.T. Ray, H. Whimbly, Margaret Patterson, and R. King. The individual named defendants were sued in their personal and official capacities.

All the defendants participated as appellees in the United States Court of Appeals for the Eleventh Circuit. The United States intervened in the court of appeals, pursuant to 28 U.S.C. § 2403(a), to defend the constitutionality of the statute.

The United States and each of the defendants listed above are respondents in this Court pursuant to this Court's Rule 12.6, but the question presented herein has no application to the individual defendants sued in their personal capacities.

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OPINIONS BELOW

The opinion of the Eleventh Circuit (Pet. App. 1a-23a) is unreported. The district court's opinion granting summary judgment to the State on sovereign immunity grounds (Pet. App. 24a-28a) is also unreported.

JURISDICTION

The court of appeals entered its judgment on September 16, 2004, and denied a petition for rehearing *en banc* on December 9, 2004. Pet. App. 29a-30a. The petition for *certiorari* was filed on March 9, 2005, within 90 days of the latter date. This Court granted the petition on May 16, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Eighth, Eleventh and Fourteenth Amendments to the United States Constitution, and of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, are set forth in the appendix to the petition for *certiorari*. Pet. App. 31a-36a.

STATEMENT

A. Factual Background[1]

This case involves the State of Georgia's treatment of petitioner Tony Goodman at the Georgia State Prison

[1] Because the district court entered summary judgment for the respondents on petitioner Goodman's claim under the Americans with Disabilities Act (Pet. App. 24a-27a), the material facts discussed in the text are drawn from the affidavits, declarations, and other documentary evidence submitted by the parties in the district court with "all justifiable inferences" drawn in favor of Goodman. *See Groh v. Ramirez*, 540 U.S. 551, 563 (2004) (internal quotation marks omitted).

(GSP) in Reidsville, Georgia, during Goodman's incarceration in that prison from 1996 to 1999, and from 2004 to the present. Pet. App. 2a, 20a. Goodman has had paraplegia since a 1992 automobile accident that injured his spinal cord; he uses a wheelchair to move about. J.A. 64-65 ¶¶15-16, 88 ¶12, 107 ¶2; *see id.* at 100 (Georgia Department of Corrections Medical Clinic form) (diagnosing Goodman as "paraplegic").[2]

The State has confined Goodman to a 12-foot by 3-foot cell for twenty-three to twenty-four hours each day because of the inaccessibility of other facilities in GSP. J.A. 64 ¶11, 67 ¶1, 71 ¶8, 106. The cell is too narrow to permit him to turn his wheelchair around. J.A. 60 ¶4, 71 ¶8. And because the bed in his cell is inaccessible, Goodman is often forced to sleep in his wheelchair or risk injury in transferring to his bed. J.A. 60 ¶3, 88 ¶7, 103 ¶14, 108 ¶5.

The State has not provided Goodman with accessible sanitary facilities. He has on a number of occasions experienced significant injuries (including broken bones) when he attempted to transfer from his wheelchair to the toilet in his cell. J.A. 59 (broke his left foot and crushed his left knee on May 14, 1999, trying to transfer to the toilet), 108-109 ¶¶6-8 (injured right knee on August 26, 1998), 103 ¶18 (injured his right leg and neck on July 1, 1998), 88 ¶7 (identifying dates in 1996 and 1997 where Goodman was injured trying to transfer from his wheelchair);

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[2] In their brief in opposition to the petition for *certiorari*, respondents attempted to cast doubt on petitioner's disability by referring to the events underlying his criminal conviction. Br. in Opp. 3 n.2. But petitioner's allegations of the substantial limitations in his ability to walk are supported not only by prison medical records and sworn affidavits discussed in the text, but also by respondents' own pleadings in the district court. *See* J.A. 96 ¶4 (Respondents' Statement of Material Facts) (explaining that petitioner was assigned to his housing unit because of "the special requirements associated with his being wheel chair bound").

see also id. at 63-64 ¶10 (bathrooms at prison library and church, as well as other areas of prison, do not comply with ADA standards). On other occasions, when Goodman was unable to reach the toilet, he was "required to live and sit in [his] own feces and other body waste" and was denied cleaning supplies and assistance in cleaning his wheelchair and cell. J.A. 65 ¶17; *see id.* at 59 (describing May 14, 1999 incident), 103 ¶16 (describing October 5, 1998 incident). In fact, Goodman was punished for not cleaning up the waste in his cell – the State confiscated his legal materials as a sanction. J.A. 59. Prison guards have repeatedly denied Goodman's requests that they assist him in transferring from his wheelchair to the toilet or bed. J.A. 103 ¶15, 108 ¶5.

Goodman was unable to take a shower "for more than two (2) years," because GSP's showers are inaccessible to wheelchair users. J.A. 60 ¶4, 67 ¶2. He has fallen and injured himself on multiple occasions when attempting to transfer from his wheelchair to a jury-rigged seat in the shower stall. J.A. 109 ¶9 (describing April 8, 1999 incident), 88 ¶7 (identifying dates in 1996 and 1997 where Goodman was injured trying to transfer from his wheelchair).

The inaccessibility of GSP's facilities has left Goodman without access to virtually any prison services, programs, and activities to which "other similar security [level] inmates have access." J.A. 65 ¶18. Goodman has been denied physical therapy services. J.A. 64-65 ¶15, 99 ¶10; *see id.* at 91 (letter from staff physician at GSP stating "PT is not available here"). He has also been denied access to the prison law library and "congregate religious services" that are "available to inmates who do not have disabilities." J.A. 105; *see also id.* at 98-99 ¶3, 108 ¶3, 65 ¶18 (denied "religious rights" to which "other similar security [level] inmates have access").

Numerous GSP officials, from the Warden and Deputy Warden to the line staff at the prison, are aware of these

problems and have done nothing to stop or solve them. J.A. 60, 98 ¶1. Moreover, prison staff ignored Goodman's repeated requests for medical care, J.A. 98 ¶1, refused to provide Goodman the treatment and medication prescribed by doctors, J.A. 101 ¶2, 103 ¶12, 109 ¶10, and refused to provide parts for or repair his wheelchair when it was broken, J.A. 88 ¶8.

B. Proceedings Below

1. In 1999, Goodman filed this suit *pro se* in the United States District Court for the Southern District of Georgia, against respondents the State of Georgia, the Georgia Department of Corrections, and a number of Georgia prison officials. Pet. App. at 3a, 20a. Goodman asserted two basic claims. First, invoking 42 U.S.C. § 1983, he alleged that respondents had violated his Eighth Amendment right to be free of cruel and unusual punishment. Pet. App. 3a. Second, he alleged that they had violated Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12131 *et seq.*, which prohibits States from discriminating against individuals with disabilities. Pet. App. 3a. Goodman sought monetary damages on both claims and injunctive relief on the ADA claim. *Ibid.*

Pursuant to a provision of the Prison Litigation Reform Act (PLRA) that imposes mandatory screening duties on district courts in prison cases, *see* 28 U.S.C. § 1915A, the district court, *sua sponte*, dismissed Goodman's Section 1983 claims against all respondents for failure to state a claim. Pet. App. 9a-10a. But the district court concluded that the complaint "arguably stated a colorable claim for relief" under Title II and permitted the ADA claim to proceed against the State of Georgia and the Georgia Department of Corrections. Pet. App. 10a.

The parties subsequently filed cross-motions for summary judgment on the ADA claim. Determining that there was a genuine issue of material fact regarding the

respondents' compliance with the ADA, the district court denied the motions. J.A. 22, 25. The district court also concluded that a disputed issue of material fact existed regarding whether Goodman was physically injured when he tried to transfer himself from his wheelchair to the toilet. J.A. 24. As a result, the applicability of the PLRA's prohibition on an inmate's recovery of damages for mental or emotional injury in the absence of a "physical injury," 42 U.S.C. § 1997e(e), could not be resolved on summary judgment. J.A. 24.

In October 2001, following this Court's decision in *Board of Trustees v. Garrett*, 531 U.S. 356 (2001), which held that Title I of the ADA (which bars disability-based discrimination in employment) could not validly abrogate state sovereign immunity, respondents filed a renewed motion for summary judgment. Pet. App. 12a. They contended that the Eleventh Amendment barred Goodman's claims insofar as he sought damages against the State and that Goodman's claim for injunctive relief had been rendered moot when he was transferred out of GSP in 1999. *Ibid.* The district court agreed and granted the motion. Pet. App. 24a-27a.

2. The Eleventh Circuit affirmed the district court's dismissal of the Title II claims against the State, but it reversed the district court on other grounds and permitted the Section 1983 claim and the Title II injunctive claim against the state officials to proceed. On the Section 1983 claim, the court of appeals held that Goodman's complaint stated a claim for a violation of the Eighth Amendment in three respects. First, by confining him to a cell in which he could not move his wheelchair, the individual respondents effectively imposed "some form of total restraint twenty-three to twenty-four hours-a-day without penal justification," in violation of the principles articulated in *Hope v. Pelzer*, 536 U.S. 730, 738 (2002). Pet. App. 18a. Second, by forcing Goodman "to sit in his own bodily waste because

prison officials refused to provide assistance," the individual respondents violated the principles articulated in a long line of Eighth Amendment cases that have "accord[ed] particular weight to exposure to human waste." Pet. App. 18a & n.10 (citing *McBride v. Deer*, 240 F.3d 1287, 1292 (10th Cir. 2001); *McCord v. Maggio*, 927 F.2d 844, 848 (5th Cir. 1991); *Fruit v. Norris*, 905 F.2d 1147, 1151 (8th Cir. 1990); *Johnson v. Pelker*, 891 F.2d 136, 139 (7th Cir. 1989); *La Reau v. MacDougall*, 473 F.2d 974, 978 (2d Cir. 1972), *cert. denied*, 414 U.S. 878 (1973)). Third, by "knowingly providing no physical therapy and inadequate medical treatment," by their "systematic denial of access to virtually all prison programs and activities because of [Goodman's] disability," and by providing "woefully inadequate and inhumane prison facilities for the disabled, such as toilets without the necessary support or handrails," the individual respondents showed "deliberate indifference" to Goodman's "serious medical condition." Pet. App. 18a-19a; *see Estelle v. Gamble*, 429 U.S. 97, 104-105 (1976).

On the ADA claim, the court of appeals sought additional briefing from the parties (including the United States, which intervened to defend the constitutionality of the statute) following this Court's decision in *Tennessee v. Lane*, 541 U.S. 509 (2004). Subsequent to that briefing, the court of appeals agreed with the district court that Goodman's claims against Georgia and the Georgia Department of Corrections were barred by the Eleventh Amendment. Pet. App. 19a.[3] The court of appeals relied (Pet. App. 19a) on its decision in *Miller v. King*, 384 F.3d 1248 (11th Cir.

[3] The court of appeals held that Goodman's claims for injunctive relief against state officials in their official capacities could proceed under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), and it reversed the district court's conclusion that Goodman's transfer out of GSP mooted the request for injunctive relief; Goodman had been transferred back to GSP while the appeal was pending. *See* Pet. App. 20a-21a.

2004), a case argued on the same day as Goodman's, in which the same three-judge panel had ruled that "Title II of the ADA, as applied in the Eighth-Amendment context to state prisons, fails to meet the requirement of proportionality and congruence" used to assess the validity of Fourteenth Amendment legislation. *Id.* at 1273, 1275 (citing *City of Boerne v. Flores*, 521 U.S. 507, 533 (1997)). Title II's abrogation of state sovereign immunity was thus not a valid exercise of Congress's enforcement authority under Section 5 of the Fourteenth Amendment in the view of the court of appeals – even in a case like *Miller* and the present case, where the plaintiff stated a claim that the conditions challenged under Title II also violated his constitutional rights. *See id.* at 1276 n.34.

SUMMARY OF ARGUMENT

I. As applied to discrimination against state inmates, Title II of the Americans with Disabilities Act is a congruent and proportional response to actual and threatened constitutional violations and therefore validly abrogates state sovereign immunity under Section 5 of the Fourteenth Amendment. *See City of Boerne v. Flores*, 521 U.S. 507, 518 (1997). This case is strikingly similar to *Tennessee v. Lane*, 541 U.S. 509 (2004), in which the Court upheld Title II as proper Section 5 legislation in the access-to-courts context. Indeed, the argument for upholding Title II is even stronger in the prison context. Each of the three factors this Court considered in *Lane* weighs heavily in favor of concluding that the statute is proper Section 5 legislation here.

First, in the prison context, as in the access-to-courts context, Title II enforces not only the Fourteenth Amendment's "prohibition on irrational disability discrimination" but also "other basic constitutional guarantees, infringements of which are subject to more searching judicial review" than rational-basis review. *Id.* at 522-523. As in

the access-to-courts context, the Constitution imposes on States "a number of affirmative obligations," *id.* at 532, in the prison context. This Court has repeatedly held that affirmative constitutional obligations arise from the State's total domination of an inmate's life. Prisons are places in which "the government exerts a degree of control unparalleled in civilian society," and inmates are "dependent on the government's permission and accommodation" to satisfy virtually all of their basic human needs. *Cutter v. Wilkinson*, 125 S. Ct. 2113, 2121-2122 (2005). As a consequence, the Eighth Amendment's prohibition against Cruel and Unusual Punishments, the Fourteenth Amendment's Due Process Clause, and other Bill of Rights guarantees all require that the State provide reasonable accommodations for inmates' disabilities in some circumstances.

Second, even more than in the access-to-courts context, Title II responds to a history "of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights." *Lane*, 541 U.S. at 524. *Lane* itself specifically recognized that the States' "pattern of unequal treatment" of individuals with disabilities extended to "the penal system." *Id.* at 525 & n.11. And the evidence before Congress during the two decades that it studied the problem demonstrated that state violations of the constitutional rights of inmates with disabilities were widespread. Far more than in *Lane*, a massive body of lower-court cases finding constitutional violations in this context provides "confirming judicial documentation," *Board of Trustees v. Garrett*, 531 U.S. 356, 376 (2001) (Kennedy, J., concurring), of that conclusion. Earlier statutes – including the Rehabilitation Act of 1973 and the Civil Rights of Institutionalized Persons Act of 1980 – failed to solve the problem of widespread violations of disabled inmates' constitutional rights. Because Congress "confronted a 'difficult and intractable proble[m],' where previous legislative attempts had failed," *Nevada Dep't of Human Resources v. Hibbs*,

538 U.S. 721, 737 (2003) (alteration in original) (citation omitted), Congress was within its constitutional authority to adopt "added prophylactic measures" to address the problem, *id.* at 731.

Third, as in the access-to-courts context, Title II is an "appropriate response" to this history and pattern of unequal treatment. *Lane*, 541 U.S. at 530. The statute targets conduct that has "a significant likelihood of being unconstitutional." *City of Boerne*, 521 U.S. at 532. Congress also carefully limited its intrusion into legitimate state prerogatives. The statute extends only to individuals with a "disability," *see* 42 U.S.C. §§ 12102(2), 12132, and inmates who satisfy that term's statutory definition are particularly likely to have "serious medical needs" that require accommodation under the Eighth Amendment and other constitutional provisions. *See, e.g.*, *Estelle v. Gamble*, 429 U.S. 97, 104-105 (1976). The statute's requirement of "reasonable modifications," 42 U.S.C. § 12131, takes account of the unique state interests in the prison context and further directs the statute at state conduct that is likely to be unconstitutional. And the limitations this Court has identified in Title II's damages remedy, as well as significant limitations imposed by the Prison Litigation Reform Act, also "tend to ensure Congress' means are proportionate to ends legitimate under § 5." *Hibbs*, 538 U.S. at 739 (internal quotation marks omitted). In light of the powerful record of state violations of the constitutional rights of inmates with disabilities, the same conclusion that the Court reached in the access-to-courts context is warranted here: Title II is "a reasonable prophylactic measure, reasonably targeted to a legitimate end." *Lane*, 541 U.S. at 533.

II. Even if this Court were not to agree that Title II is valid prophylactic Section 5 legislation in the prison context, the judgment of the court of appeals must nonetheless be reversed. The court of appeals concluded that

the same allegations that underlie Goodman's Title II claim also state a claim for a violation of the Eighth Amendment's Cruel and Unusual Punishments Clause. As applied to the facts of this case, then, the statute does nothing more than provide a remedy for an actual violation of Goodman's constitutional rights.

In *Lane*, 541 U.S. at 531 & n.19, this Court reaffirmed the principle that a statute must be upheld if Congress had the power to reach the fact setting addressed by the plaintiff's complaint – even if other applications of the statute might exceed Congress's power. The Court relied on *United States v. Raines*, 362 U.S. 17 (1960), which held that a statute challenged as exceeding Congress's Fifteenth Amendment enforcement power should be upheld "if the complaint here called for an application of the statute clearly constitutional." *Id.* at 24-25 (quoted in *Lane*, 541 U.S. at 531 n.19); *see also Griffin v. Breckenridge*, 403 U.S. 88, 104 (1966). This case is in the same posture as that of *Lane*, *Raines*, and *Griffin*. Whatever the outer boundaries of Title II's constitutionally permissible sweep may be, Congress plainly had Section 5 power to apply the statute here, where the State's conduct violated not just Title II but also the Constitution itself. *See City of Boerne*, 521 U.S. at 519-520 (Congress has power to provide remedies for actual constitutional violations).

ARGUMENT

There is no doubt that Congress intended to abrogate state sovereign immunity against suits asserting that a State violated Title II of the ADA. *See* 42 U.S.C. § 12202; *Tennessee v. Lane*, 541 U.S. 509, 518 (2004) (Section 12202 unequivocally expresses Congress's intent to abrogate state sovereign immunity against Title II suits). Nor is there any dispute that "Title II of the ADA unambiguously extends to state prison inmates." *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 213 (1998). This case presents only

the question whether Congress had the power to effectuate its abrogation.

This Court has repeatedly held that Congress may abrogate state sovereign immunity when it enacts legislation pursuant to Section 5 of the Fourteenth Amendment. *See Lane*, 541 U.S. at 518; *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). Congress specifically invoked its Section 5 power when it enacted the ADA. *See* 42 U.S.C. § 12101(b)(4) (invoking "the sweep of congressional authority, including the power to enforce the fourteenth amendment").

For the reasons described by the United States in *Lane*, Title II in all of its applications is a valid exercise of that power and petitioner Goodman urges reversal of the court of appeals' judgment on that ground. *See* Brief for the United States, *Tennessee v. Lane*, No. 02-1667. As in *Lane*, however, this Court can decide the case on a narrower ground. *See Lane*, 541 U.S. at 530-531. Title II readily qualifies as valid Section 5 legislation as applied to state discrimination against inmates with disabilities in the administration of the penal system.

I. TITLE II IS VALID SECTION 5 LEGISLATION AS APPLIED TO STATE DISCRIMINATION AGAINST INMATES WITH DISABILITIES

In *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997), this Court recognized that Section 5 authorizes Congress to adopt "[l]egislation which deters or remedies constitutional violations." The Court further held that valid Section 5 legislation may be prophylactic – it may "prohibit[] conduct which is not itself unconstitutional" – but "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 518, 520. Applying that test, this Court held in *Lane* that, at least insofar "as it applies to the class of cases implicating the accessibility of judicial

services," Title II "unquestionably is valid § 5 legislation." *Lane*, 541 U.S. at 531.

The same conclusion is warranted in the class of cases implicating the accessibility of prisons and discrimination against inmates with disabilities. Indeed, the argument for upholding Title II is even stronger in the context of incarceration. Prisons are places in which the State has near-total control over all aspects of an inmate's life on a twenty-four hour basis, including the very means for his existence through food and water, sanitation, and physical safety. The Constitution consequently imposes affirmative obligations on the jailer, including obligations to provide reasonable accommodations to inmates with disabilities. *Cf. Lane*, 541 U.S. at 532 (relying on similar "affirmative obligations" that the Constitution imposes on States in the access-to-courts context). States, however, have a long history of violating those constitutional requirements – a history that, more than in *Lane* or any other post-*Boerne* case, has been extensively documented by the federal courts. As the following sections demonstrate, Congress's enactment of Title II responded in a congruent and proportional manner to that intractable problem.

A. Title II Enforces Basic Constitutional Rights Retained By Inmates With Disabilities

The "first step" of the congruence and proportionality inquiry is "to identify the constitutional right or rights that Congress sought to enforce when it enacted Title II." *Lane*, 541 U.S. at 522. Title II prohibits States from discriminating against individuals with disabilities. 42 U.S.C. § 12132. As part of that prohibition, the statute requires States to make "reasonable modifications" to rules, policies, or practices, to remove "architectural, communications, or transportation barriers," and to provide "auxiliary aids and services" where those responses are necessary to avoid disability-based discrimination. *Id.* § 12131(2); *see also* 28

C.F.R. § 35.130(b)(7) ("A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.").

As the Court held in *Lane*, Title II enforces a number of constitutional rights. Those rights include the Equal Protection Clause's "prohibition on irrational disability discrimination," *Lane*, 541 U.S. at 522; *see City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 450 (1985), as well as "a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review." *Lane*, 541 U.S. at 522-523.

Attempting to distinguish *Lane*, however, the court of appeals held that the Constitution imposes only "markedly narrow" and "negative" duties on States in the prison context. *Miller*, 384 F.3d at 1274; *see* Pet. App. 19a (relying on *Miller*). But that is incorrect. State prisons are not like the employment context addressed in *Garrett*, 531 U.S. at 368, where "[i]f special accommodations for the disabled are to be required, they have to come from positive law." In the prison context, as in the access-to-courts context addressed in *Lane*, 541 U.S. at 532, the Constitution itself imposes on States "affirmative obligations" in their treatment of individuals with disabilities. Because Title II, as applied to the prison context, enforces constitutional obligations that demand "more searching judicial review" than does the prohibition on irrational discrimination at issue in the employment setting, *id.* at 522-523, Congress had broader leeway to craft a remedy here than it did in *Garrett*. *See Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 735-736 (2003).

1. Title II Enforces Those Constitutional Rights That Require Accommodation Of Inmates With Disabilities Because Of The State's Control Over The Inmate And His Environment

"In the prison context," the State's power over an individual "is at its apex." *Johnson v. California*, 125 S. Ct. 1141, 1150 (2005). Prisons are places in which "the government exerts a degree of control unparalleled in civilian society," control that leaves inmates "dependent on the government's permission and accommodation" to satisfy virtually all of their basic human needs. *Cutter v. Wilkinson*, 125 S. Ct. 2113, 2121-2122 (2005). Under this Court's longstanding precedents, the State's control over the inmate, and the inmate's correlative dependence, create affirmative constitutional obligations: "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 199-200 (1989).

One important source of affirmative State obligations in the prison setting is the Eighth Amendment's Cruel and Unusual Punishments Clause, which has been incorporated in the Fourteenth Amendment. *See Robinson v. California*, 370 U.S. 660, 666 (1962). The Eighth Amendment requires States to "provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must 'take reasonable measures to guarantee the safety of the inmates.'" *Farmer v. Brennan*, 511 U.S. 825, 832 (1994); *see also City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244 (1983) (inmates imprisoned in jails prior to conviction have "due process rights" that "are at least as great as the Eighth Amendment protections available to a convicted prisoner"). A State's refusal to

provide accommodation to inmates with disabilities often violates these constitutional obligations.

The refusal to accommodate an inmate's disability can constitute "deliberate indifference to serious medical needs" that violates the Eighth Amendment. *Estelle*, 429 U.S. at 104. As then-retired Justice Powell wrote while sitting by designation on the Fourth Circuit, prison officials violate *Estelle* when they "ignore the basic needs of a handicapped individual or postpone addressing those needs out of mere convenience or apathy." *La Faut v. Smith*, 834 F.2d 389, 394 (4th Cir. 1987). Courts have repeatedly applied these principles to hold that the Eighth Amendment requires prisons to reasonably accommodate disabled inmates in circumstances that resemble this case, where the requested accommodation relates to issues of basic mobility and access to hygienic facilities. *See* pp. 27-29, *infra*. They have applied the same principles to hold that the Eighth Amendment requires prisons to provide accommodations (such as sign-language interpreters) to enable disabled inmates to receive needed medical treatment. *See* pp. 29-31, *infra*.

The Eighth Amendment also requires accommodation of inmates' disabilities in other situations, such as housing and placement decisions. Because the State must "take reasonable measures for the prisoners' own safety," *Washington v. Harper*, 494 U.S. 210, 225 (1990), the Constitution requires it to accommodate the disabilities of inmates with mental illness who are suicidal[4] or whose conditions

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[4] *See, e.g., Jacobs v. West Feliciana Sheriff's Dep't*, 228 F.3d 388, 395 (5th Cir. 2000) (placement of inmate who was a known suicide risk in a cell with "a significant blind spot and tie-off points" from which a person could hang herself constitutes deliberate indifference); *Partridge v. Two Unknown Police Officers*, 791 F.2d 1182, 1187 (5th Cir. 1986) (failure to take steps to prevent suicide may constitute deliberate indifference to serious medical needs).

will significantly deteriorate if they are assigned to particular housing units.[5] And the failure to accommodate disability in making housing decisions can constitute "deliberate indifference to inmate health or safety," *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (internal quotation marks omitted), that violates the State's Eighth Amendment duty to protect inmates against harm from other inmates, where a physical or mental disability makes an inmate especially vulnerable to abuse or assault by other inmates. *See, e.g.*, *Ruiz v. Estelle*, 503 F. Supp. 1265, 1344 (S.D. Tex. 1980) (inmates with mental retardation "are peculiarly in need of special protection from physical, emotional, sexual, and financial abuse at the hands of others"), *aff'd in relevant part*, 679 F.2d 1115 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983); 45 Fed. Reg. 37,630 (June 3, 1980) (analysis of regulations implementing Section 504 of the Rehabilitation Act of 1973) ("In making housing and program assignments, [correctional] officials must be mindful of the vulnerability of some handicapped inmates to physical and other abuse by other inmates.").

The State's complete control over the prison environment also entails the affirmative obligation to facilitate inmates' exercise of fundamental Bill of Rights guarantees that have been incorporated in the Fourteenth Amendment. "Prison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Turner v. Safley*, 482 U.S. 78, 84 (1987). For example, States must afford inmates "a reasonably adequate opportunity to

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[5] *See, e.g.*, *Madrid v. Gomez*, 889 F. Supp. 1146, 1265-1266 (N.D. Cal. 1995) (Eighth Amendment prohibits assigning, *inter alia*, people with mental illness, mental retardation, or brain damage to the Security Housing Unit (SHU); "[f]or these inmates, placing them in the SHU is the mental equivalent of putting an asthmatic in a place with little air to breathe" and is "'very likely' to render them psychotic or otherwise inflict a serious mental illness or seriously exacerbate an existing mental illness").

present claimed violations of fundamental constitutional rights to the courts," whether by providing "law libraries and legal assistance" or by offering other effective means to ensure access. *Lewis v. Casey*, 518 U.S. 343, 351-352 (1996). States must also afford inmates "reasonable opportunities" to exercise their religion. *Cruz v. Beto*, 405 U.S. 319, 322 n.2 (1972).

Judicial enforcement of these fundamental constitutional rights is limited in the prison setting by the Court's recognition of "the urgency of discipline, order, safety, and security in penal institutions." *Cutter*, 125 S. Ct. at 2123. As articulated by this Court in *Turner*, 482 U.S. at 89, "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *See Lewis*, 518 U.S. at 361; *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987). *Turner*'s reasonable-relation test does not apply to inmates' claims under the Eighth Amendment or the Equal Protection Clause. *See, e.g.*, *Johnson*, 125 S. Ct. at 1149-1150.[6] But even where it does apply, that reasonable-relation test does not eliminate the government's affirmative, judicially-enforceable obligations. To the contrary, *Turner* itself makes clear, in light of the State's complete control of an inmate's means of exercising his rights, that a State can be required to provide some "accommodation of the asserted constitutional right." 482 U.S. at 90; *see also Overton v. Bazzetta*, 539 U.S. 126, 135 (2003) (the absence of "alternative means of exercising the constitutional right" is evidence of unreasonableness); *O'Lone*, 482 U.S. at 350 ("the availability of accommodations is relevant to the reasonableness inquiry"). In cases like Goodman's,

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[6] *See also Wilkinson v. Austin*, 125 S. Ct. 2384, 2395 (2005) (applying three-factor test of *Mathews v. Eldridge*, 424 U.S. 319 (1976), rather than *Turner* test, to procedural due process claim in prison setting).

where the State's refusal to accommodate an inmate's disability prevents use of facilities such as the prison chapel and law library, Title II enforces these constitutional rights as well.

Finally, Title II enforces States' affirmative obligation, imposed by the Due Process Clause of the Fourteenth Amendment, to provide adequate procedures before "impos[ing] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life" or otherwise depriving the inmate of a protected liberty or property interest. *Sandin v. Conner*, 515 U.S. 472, 484 (1995). That procedural obligation applies when the State seeks to administer antipsychotic drugs without the inmate's consent, *see Harper*, 494 U.S. at 222, when the State seeks to transfer an inmate to a "supermax" facility or a psychiatric hospital, *see Wilkinson*, 125 S. Ct. at 2394-2395; *Vitek v. Jones*, 445 U.S. 480, 493 (1980), when the State seeks to revoke good-time credits earned by an inmate, *see Wolff v. McDonnell*, 418 U.S. 539, 556-557 (1974), and in other similar circumstances, *see, e.g.*, *Sandin*, 515 U.S. at 487 (suggesting that due process is required "where the State's action will inevitably affect the duration of [the inmate's] sentence").

In these circumstances, due process requires that the State provide the inmate notice and a meaningful opportunity to be heard and participate in the decision-making process. *See Wilkinson*, 125 S. Ct. at 2396; *Harper*, 494 U.S. at 235; *Vitek*, 445 U.S. at 494-496. Where an inmate's disability, such as an inability to hear, limits his opportunity to participate without accommodation, those principles require that the State accommodate the disability. *See Bonner v. Arizona Dep't of Corr.*, 714 F. Supp. 420, 425 (D. Ariz. 1989) (Due Process Clause requires that "deaf, mute, and vision-impaired inmate" receive an interpreter in disciplinary proceedings against him).

2. Title II Enforces Constitutional Rights That Prohibit Discrimination Against Inmates With Disabilities

Title II's prohibition of discrimination against inmates with disabilities also enforces their right to equal protection recognized in *Cleburne*, 473 U.S. at 450. This Court has recently emphasized that the Equal Protection Clause's prohibition on invidious discrimination "is not a right that need necessarily be compromised for the sake of proper prison administration" and thus applies fully in the prison context. *Johnson*, 125 S. Ct. at 1149.

Indeed, in the context of prisons, invidious discrimination against individuals with disabilities may violate not only the Equal Protection Clause, but other constitutional rights as well. Sometimes, discrimination takes the form of prison guards targeting inmates with disabilities for assault. *See* pp. 23, 32-33, *infra*. By prohibiting that discrimination, the statute enforces the Eighth Amendment's prohibition on using force "maliciously and sadistically to cause harm." *Hudson v. McMillian*, 503 U.S. 1, 7 (1992). In other instances, where prison officials may discriminate against inmates with disabilities in the provision of the basic necessities of life, such as food and shelter, *see* pp. 23-24, 27-28, *infra*, the statute's prohibition against such discrimination enforces the Eighth Amendment requirement that the State provide for an inmate's basic human needs. And sometimes, discrimination denies inmates with disabilities access to activities that are independently protected by other constitutional provisions such as religious services, quasi-judicial proceedings, and law libraries. *See* pp. 33-36, *infra*. By prohibiting that discrimination, the statute enforces the constitutional provisions (such as the First Amendment and the Due Process Clause) that guarantee access to those activities.

B. States Have Repeatedly Violated The Constitutional Rights Of Inmates With Disabilities

Whether Congress validly exercised its Section 5 power with respect to state prisons "is a question that 'must be judged with reference to the historical experience which it reflects.'" *Lane*, 541 U.S. at 523 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966)). Where Congress responds to a "history and pattern" of constitutional violations by States, *Garrett*, 531 U.S. at 368, its power to enact prophylactic legislation is at its strongest.

"The charge that a State has engaged in a pattern of unconstitutional discrimination against its citizens is a most serious one," *Hibbs*, 538 U.S. at 748 (Kennedy, J., dissenting), but here that charge is supported by far "more than conjecture." *Ibid.* The general pattern of state violations of the constitutional rights of individuals with disabilities over the last 40 years, *see Lane*, 541 U.S. at 524, is particularly pronounced in the prison context, where people with disabilities are legally disenfranchised and mistreatment occurs out of the public eye. *Lane* specifically recognized that the States had engaged in a "pattern of unequal treatment" of individuals with disabilities that extended to "the penal system." *Id.* at 525 & n.11 (citing *La Faut*, 834 F.2d at 394 (inmate with paraplegia denied accessible toilet facilities); *Schmidt v. Odell*, 64 F. Supp. 2d 1014 (D. Kan. 1999) (double amputee forced to crawl around the floor of jail); *Key v. Grayson*, 179 F.3d 996 (6th Cir. 1999) (deaf inmate denied access to sex offender program allegedly required for parole), *cert. denied*, 528 U.S. 1120 (2000)). Evidence presented to Congress demonstrated that state violations of disabled inmates' constitutional rights were widespread. And far more than in *Lane*, a massive body of case law involving inmates with disabilities provides "confirming judicial documentation" of extensive "patterns of constitutional

violations committed by the State." *Garrett*, 530 U.S. at 376 (Kennedy, J., concurring).

1. The Evidence Before Congress Revealed A Long History Of State Violations Of The Constitutional Rights Of Inmates With Disabilities

Congress considered the problem of state violations of the constitutional rights of inmates with disabilities for nearly two decades before it enacted the ADA. During that time, Congress adopted a number of laws to address that problem. First, Congress enacted Section 504 of the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 394. Several years later, it enacted the Civil Rights of Institutionalized Persons Act (CRIPA), Pub. L. No. 96-247, 94 Stat. 349 (1980). But despite those laws, and the availability of the general Section 1983 cause of action, inmates with disabilities continued to experience a "widespread and persisting deprivation of [their] constitutional rights." *City of Boerne*, 521 U.S. at 526.[7] In the prison

[7] The discussion that follows includes some examples of constitutional violations in nominally local jails, as well as many examples of constitutional violations in state prisons. As in *Lane*, 541 U.S. at 527 n.16, it is appropriate for the Court to consider that full record of constitutional violations in determining whether the application of Title II to discrimination against inmates with disabilities is congruent and proportional. Jails, like prisons, hold inmates who have been convicted of crimes following prosecutions brought in the name of the State, in state courts, for violations of laws enacted by the state legislature, although jail inmates usually serve shorter sentences than do prison inmates. Jails also hold inmates who have been denied bail pending criminal prosecution in state court or who have been remanded to state custody pending sentencing after conviction by state court. Like nominally local courts, nominally local jails are also frequently deemed to be "arms of the State" who "enjoy precisely the same immunity from unconsented suit as the States." *Ibid.*; *see, e.g.*, *Manders v. Lee*, 338 F.3d 1304, 1328 (11th Cir. 2003) (*en banc*) (county sheriff in Georgia "is an arm of the State, not Clinch County, in establishing use-of-force policy

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context specifically, Congress thus "confronted a 'difficult and intractable proble[m],' where previous legislative attempts had failed." *Hibbs*, 538 U.S. at 737 (citation omitted; quoting *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 88 (2000)). That problem demanded "powerful remedies," *Kimel*, 528 U.S. at 88, including "added prophylactic measures," *Hibbs*, 538 U.S. at 737.

By the time Congress enacted the ADA in 1990, it had long experience with the problem of state violations of the constitutional rights of inmates with disabilities. In 1971 and 1972, Congress first touched on the issues in a series of hearings that examined state prison conditions generally.[8]

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at the jail and in training and disciplining his deputies in that regard"), *cert. denied*, 540 U.S. 1107 (2004); *Lancaster v. Monroe County*, 116 F.3d 1419, 1429 (11th Cir. 1997) (county jailers in Alabama "are state officials entitled to Eleventh Amendment immunity when sued in their official capacities"); *see also Cromer v. Brown*, 88 F.3d 1315, 1332 (4th Cir. 1996) (sheriffs in South Carolina are arms of the State); *Wilkerson v. Hester*, 114 F. Supp. 2d 446, 464-465 (W.D.N.C. 2000) (sheriffs in North Carolina are arms of the State). Accordingly, as in *Lane*, it is appropriate for this Court to look to "conduct of county and city officials" as well as that of States in examining the validity of Congress's action. *Lane*, 541 U.S. at 527 n.16.

[8] *See, e.g.*, *Corrections, Part VIII, Prisons, Prison Reform, and Prisoners' Rights: Michigan: Hearings Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 92d Cong., 2d Sess. 154 (1972) (reprinting judicial opinion discussing inmate with paralysis who could not take showers or use the sink in his cell and was denied a wash pan or basin); *id.* at 136 (same, finding failure to accommodate the dietary needs of inmates with diabetes); *id.* at 153 (same, finding failure to accommodate suicidal inmate's depression by moving him from unsafe cell; the inmate killed himself); *American Prisons in Turmoil: Hearings Before the House Select Comm. on Crime*, 92d Cong., 1st Sess. 249-250 (1971) ("[A] retarded prisoner just cannot cope with what he is faced with in a prison system as it now exists in Florida. There are some people in the prison system that have IQ's of 50, 55, and 60."); *id.* at 256 ("Those with deep-seated mental trouble are mingled in the general prison population to their own detriment and the rest of the prisoners.").

In the late 1970's, while considering the legislation that was ultimately enacted as CRIPA, Congress focused extensively on violations of disabled inmates' rights. Committee hearings on the bill uncovered a wide-ranging record of state violations of the constitutional rights of inmates with disabilities. Congress heard evidence of cases, similar to Goodman's, where the State denied a disabled inmate accommodations that were necessary for basic mobility, sanitary, or medical needs.[9] Congress also heard testimony that inmates with mental and physical disabilities were frequent targets of "[p]hysical abuse at the hands of officers and other inmates." *Civil Rights for Institutionalized Persons: Hearings on H.R. 2439 and H.R. 5791 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 240 (1977) [hereinafter *CRIPA House Hearings*] (testimony of Stanley Van Ness) ("mentally deficient" inmates as targets of such abuse).[10] And Congress heard of an instance where corrections officers fed inmates with psychiatric disabilities a non-nutritious

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[9] *See, e.g., Civil Rights of Institutionalized Persons: Hearings on S. 1393 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 639 (1977) [hereinafter *CRIPA 1977 Senate Hearings*] (testimony of Alvin Bronstein) (inmate who used a wheelchair was placed in a cell on the inaccessible second floor, which he had been unable to leave "for years"); *id.* at 1066 (months- or year-long delays in obtaining prosthetic devices); *id.* at 1067 (inmate with quadriplegia developed bedsores that became infested with maggots because of failure to bathe him and change his dressings); *ibid.* (inmate who had a stroke "was made to sit day after day on a wooden bench beside his bed so that the bed would be kept clean").

[10] *See also Civil Rights of the Institutionalized: Hearings on S. 10 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 474 (1979) [hereinafter *CRIPA 1979 Senate Hearings*] (statement of the National Prison Project) (victimization, including rape, of inmates with mental retardation); 126 Cong. Rec. S1860 (daily ed. Feb. 27, 1980) (statement of Sen. Bayh) ("gang rape situation of a paraplegic inmate").

"'stew' (containing no meats or vegetables)," that "did not contain the basic ingredients found in the stew served to other inmates"; when asked why, the officers responded that "mental cases don't know what they eat anyway." *CRIPA 1977 Senate Hearings*, *supra*, at 234 (statement of Dr. Bailus Walker, Jr.).

In addition, Congress heard extensive testimony – bolstered by the judgments of a number of federal courts – that States failed to provide constitutionally adequate mental health treatment to inmates with psychiatric disabilities. *See, e.g.*, *CRIPA House Hearings*, *supra*, at 293 (statement of Drew S. Days, III); *id.* at 316-317, 320-321 (judicial finding of unconstitutional treatment in Louisiana); *CRIPA 1977 Senate Hearings*, *supra*, at 121 (statement of the Mental Health Advocacy Project) (discussing inadequate psychiatric treatment in Los Angeles County Jail); *id.* at 569-570 (statement of the Prisoner Assistance Project) (discussing inadequate psychiatric treatment in Maryland prisons); *id.* at 1066-1067 (judicial finding of unconstitutional treatment in Alabama); *id.* at 1107 (judicial finding of unconstitutional treatment in Oklahoma); *CRIPA 1979 Senate Hearings*, *supra*, at 70 (Report of Task Panel on Legal and Ethical Issues of President's Commission on Mental Health); *id.* at 35 (statement of Drew S. Days, III) (discussing inadequate psychiatric treatment in Florida prisons).

On the basis of that and other testimony, Congress enacted CRIPA, which empowered the Attorney General to bring suits to enforce the constitutional rights of state inmates, in 1980. *See* 42 U.S.C. § 1997 *et seq.* But as Congress moved to consider the ADA, it confronted significant evidence that state violations of disabled inmates' constitutional rights continued. A 1983 Civil Rights Commission report that was considered prominently by Congress specifically listed "[i]nadequate treatment and rehabilitation programs in penal and juvenile facilities,"

"[i]nadequate ability to deal with physically handicapped accused persons and convicts (e.g., accessible jail cells and toilet facilities)" and "[a]buse of handicapped persons by other inmates" as among the discrimination problems faced by individuals with disabilities. U.S. Comm'n on Civil Rights, *Accommodating the Spectrum of Individual Abilities* 168 (1983); *cf. Lane*, 541 U.S. at 527 (relying on that Civil Rights Commission report).

In 1988, the chair of the House Subcommittee on Select Education and Civil Rights appointed the Task Force on the Rights and Empowerment of Americans with Disabilities to gather facts concerning the proposed ADA. *See* House Comm. on Educ. & Labor, *Legislative History of Pub. L. No. 101-336: The Americans with Disabilities Act* 300 (1990) [hereinafter "Leg. Hist."]. The Task Force heard a number of accounts of discrimination against inmates with disabilities. *See Lane*, 541 U.S. at 527 (relying on accounts of discrimination submitted to the Task Force). Many of those accounts related directly to state violations of the kinds of constitutional rights discussed above, pp. 14-18: subjecting inmates with developmental disabilities to longer prison terms and placing them in settings where they were especially vulnerable to abuse by fellow inmates;[11] denying medical and psychiatric treatment to inmates with disabilities;[12] and denying interpretive services to inmates with hearing impairments.[13]

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[11] *See* Lodging of the United States, *Board of Trustees v. Garrett*, No. 99-1240, at 1091 (New Mexico).

[12] *See id.* at 55 (Alaska) (jail denied medical treatment to inmate with disability); *id.* at 331 (Delaware) (denial of psychiatric care to juvenile and adult offenders).

[13] *See id.* at 572 (Illinois) (hearing-impaired jail inmates denied interpretive services); *id.* at 673 (Kansas) (deaf man held in jail and denied interpretive services); *id.* at 787 (Maryland) (deaf inmates lacked telecommunications devices for the deaf); *id.* at 1161 (North Carolina) (deaf person jailed without interpreter).

The congressional committees that considered the ADA heard additional evidence of violations of the constitutional rights of inmates with disabilities. The House Judiciary Committee report noted that "persons with epilepsy, and a variety of other disabilities," are often "deprived of medications while in jail, resulting in further seizures." Leg. Hist., *supra*, at 490; *see also id.* at 1080 (testimony of Ilona Durkin) (stating that "many adults with traumatic brain injury" are "jailed because of aberrant behavior" caused by their disability). Hearings on the bill included testimony that jail inmates with hearing impairments had been denied interpreters, so that they could not understand their rights, *see id.* at 1331 (testimony of Justin Dart), and that jail inmates with HIV had been unjustifiably isolated and humiliated by their jailers, *see id.* at 1005 (testimony of Belinda Mason) (inmate with HIV forced by officers to spend the night in a car in an open parking lot, attracting onlookers "staring and pointing at the man").

Based on all that evidence, developed over the course of two decades, Congress enacted the ADA in 1990. That statute included specific findings of widespread and persisting "discrimination against individuals with disabilities" in, *inter alia*, "public services" and "institutionalization." 42 U.S.C. § 12101(a)(2), (3). As the foregoing discussion demonstrates, Congress had ample basis for those findings.

2. A Massive Body Of Case Law Provides "Confirming Judicial Documentation" Of Extensive State Violations Of The Constitutional Rights Of Inmates With Disabilities

The evidence of unconstitutional treatment of inmates with disabilities is not limited to "unexamined, anecdotal accounts" of the sort the Court found insufficient in

Garrett, 531 U.S. at 370. Like the more general "pattern of unequal treatment" of individuals with disabilities that this Court described in *Lane*, 541 U.S. at 525, a long body of judicial decisions – beginning before the enactment of the ADA and extending to the present day – confirms that States have frequently violated the constitutional rights of inmates with disabilities. In literally dozens of cases, courts have made affirmative findings, reflected in final judgments issued in reported opinions, that States had violated the constitutional rights of inmates with disabilities. And in many other cases, ultimately resolved without reported opinion, courts have ruled that inmates with disabilities presented allegations or evidence of unconstitutional conduct sufficient to proceed with actions against state officials under 42 U.S.C. § 1983.

In short, unlike in any of this Court's other post-*Boerne* cases, a massive body of reported lower-court decisions documents "extensive litigation and discussion of the constitutional violations" in the prison setting. *Garrett*, 531 U.S. at 376 (Kennedy, J., concurring). That "confirming judicial documentation," *ibid.*, underscores the need for the prophylactic legislation enacted by Congress to protect the constitutional rights of inmates with disabilities.

Courts have repeatedly found that States violated the Eighth Amendment by failing to accommodate the basic mobility and sanitary needs of disabled inmates. In 1980, the United States District Court for the Southern District of Texas ruled, on the basis of an extensive record, that the Texas Department of Corrections violated the Eighth Amendment rights of inmates with physical disabilities by delaying the provision and maintenance of wheelchairs, hearing aids, and other assistive devices, by refusing to provide wheelchair-accessible cells, and by refusing to provide accessible toilet and shower facilities. *Ruiz*, 503 F. Supp. at 1340-1341. Numerous cases decided both

before and since the enactment of the ADA have found similar violations, often in circumstances that echo the facts of this case: confinement in cells that are not wheelchair-accessible, thus effectively preventing inmates with disabilities from leaving or moving around within their cells; and refusal to provide accessible hygienic facilities, resulting in injuries and unsanitary conditions for inmates with disabilities.[14]

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[14] *See, e.g.*, *Simmons v. Cook*, 154 F.3d 805, 807-808 (8th Cir. 1998) (confinement of inmates with paraplegia to wheelchair-inaccessible cells without accessible toilet violated Eighth Amendment); *Frost v. Agnos*, 152 F.3d 1124, 1128-1129 (9th Cir. 1998) (failure to provide accessible shower violated constitutional rights of pretrial detainee who because of his leg cast "fell and injured himself several times"); *Hicks v. Frey*, 992 F.2d 1450, 1457 (6th Cir. 1993) (placing inmate with paraplegia in an isolation cell "too small to accommodate his wheelchair," thereby denying mobility and access to a shower, violated Eighth Amendment); *Weeks v. Chaboudy*, 984 F.2d 185, 187 (6th Cir. 1993) (denial of wheelchair to inmate with paralysis, resulting in inmate's inability to shower himself or leave his cell, violated Eighth Amendment); *Johnson v. Hardin County*, 908 F.2d 1280, 1284 (6th Cir. 1990) (denial, *inter alia*, of crutches to inmate with a disability violated Eighth Amendment); *Leach v. Shelby County Sheriff*, 891 F.2d 1241, 1243-1244 (6th Cir. 1989) (several days' denial of appropriate mattress, bathing, and catheter supplies to inmate with paraplegia violated Eighth Amendment), *cert. denied*, 495 U.S. 932 (1990); *La Faut*, 834 F.2d at 394 (failure to provide appropriate toilet facilities and rehabilitation therapy to inmate with paraplegia violated Eighth Amendment); *Beckford v. Irvin*, 49 F. Supp. 2d 170, 180 (W.D.N.Y. 1999) (Eighth Amendment violation existed where inmate "was regularly deprived use of his wheelchair for extended periods of time, . . . was unable to shower, and . . . was not allowed to use a cup in order to try to bathe by taking water out of his cell toilet or drinking fountain"); *Casey v. Lewis*, 834 F. Supp. 1569, 1582 (D. Ariz. 1993) (lack of accessible bathrooms, showers, and cells violated Eighth Amendment); *see also Miller*, 384 F.3d at 1261-1263 (reversing grant of summary judgment to State prison official on Eighth Amendment claim of inmate with paraplegia who was "denied wheelchair repairs, physical therapy, medical consultations, and medical devices such as leg braces and orthopedic shoes," who was unable to move because his cell was too small to move his wheelchair and prison officials refused to remove his bed daily, and who

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Other Eighth Amendment cases have involved States' denial of essential medical care to inmates with disabilities. In a number of instances, courts have concluded that the medical treatment a State provided for particular disabilities was inadequate or simply nonexistent. Many of

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was denied accessible showers and toilets); *Bradley v. Puckett*, 157 F.3d 1022, 1025-1026 (5th Cir. 1998) (allegation that prison officials confined disabled inmate to lockdown cell with inaccessible shower facilities stated claim for violation of the Eighth Amendment); *Bryant v. Madigan*, 84 F.3d 246, 247 (7th Cir. 1996) (reversing grant of summary judgment to state prison officials on Eighth Amendment claim of inmate with quadriplegia who fell out of bed and broke his leg after prison refused to provide guardrails for his bed); *Cummings v. Roberts*, 628 F.2d 1065, 1068 (8th Cir. 1980) (jail inmate's allegation "that because the defendants failed to give him a wheelchair, he was forced to crawl on the floor" stated Eighth Amendment claim); *Allah v. Goord*, No. 04-6717, 2005 WL 1162333 at *5-*6 (S.D.N.Y. May 13, 2005) (inmate with paraplegia stated Eighth Amendment claim based on allegations that prison officials transported him in a van that did not accommodate his wheelchair, and that he was injured as a result); *Becker v. Oregon*, 170 F. Supp. 2d 1061, 1068 (D. Or. 2001) (allegation of denial of accessible shower to inmate with leg amputation states Eighth Amendment claim); *Hallett v. New York State Dep't of Corr. Servs.*, 109 F. Supp. 2d 190, 201 (S.D.N.Y. 2000) (inmate's allegation of five-month deprivation of a proper wheelchair stated claim under Eighth Amendment); *Taylor v. Plousis*, 101 F. Supp. 2d 255, 265-269 (D.N.J. 2000) (denying defendants' motion for summary judgment against claim that refusal to timely provide adequate prosthesis for dual-amputee inmate constituted deliberate indifference); *Roop v. Squadrito*, 70 F. Supp. 2d 868, 875-876 (N.D. Ind. 1999) (inmate with HIV overcame summary judgment on Eighth Amendment claim based on evidence that "he was forced to sleep on a mattress in a filthy cell, often times without access to drinking water or a flushable toilet; he was not allowed to interact with others because he was kept in isolation; and he was roused from his sleep initially on the quarter hour and later on the hour"); *Candelaria v. Coughlin*, 787 F. Supp. 368, 378 (S.D.N.Y.) (allegations that inmate with paraplegia was denied an adequate wheelchair, orthopedic treatment, and liquid dietary supplement stated Eighth Amendment claim), *aff'd*, 979 F.2d 845 (2d Cir. 1992); *Young v. Harris*, 509 F. Supp. 1111, 1113 (S.D.N.Y. 1981) (allegation that prison refused to provide disabled inmate "with a leg brace that is necessary to enable him to walk without substantial difficulty" stated an Eighth Amendment claim).

these cases predate the ADA,[15] but the problem persisted even after the statute's enactment.[16] In other instances, States

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[15] *See, e.g.*, *Wellman v. Faulkner*, 715 F.2d 269, 272-273 (7th Cir. 1983) (denial of adequate psychiatric care to inmates with mental illness violated Eighth Amendment), *cert. denied*, 468 U.S. 1217 (1984); *Ramos v. Lamm*, 639 F.2d 559, 577-578 (10th Cir. 1980) (denial of adequate mental health care, resulting in suffering, suicides, and self-mutilation by inmates violated Eighth Amendment), *cert. denied*, 450 U.S. 1041 (1981); *Tillery v. Owens*, 719 F. Supp. 1256, 1302-1303 (W.D. Pa. 1989) (inadequate care of "serious mental illness" violated Eighth Amendment), *aff'd*, 907 F.2d 418 (3d Cir. 1990); *cert. denied*, 502 U.S. 927 (1991); *Casey v. Lewis*, 834 F. Supp. 1477, 1488-1491 nn.109, 123 (D. Ariz. 1993) (inadequate treatment of inmates with HIV); *Cody v. Hilliard*, 599 F. Supp. 1025, 1058-1059 (D.S.D. 1984) (denial of adequate mental health care to inmates with "serious psychiatric needs" violated Eighth Amendment), *rev'd on other grounds*, 830 F.2d 912 (8th Cir. 1987) (*en banc*), *cert. denied*, 485 U.S. 906 (1988); *Balla v. Idaho State Bd. of Corr.*, 595 F. Supp. 1558, 1569 (D. Idaho 1984) (State violated Eighth Amendment by providing "[l]ittle or no psychiatric care or assistance" to inmates with serious mental illnesses); *Ruiz*, 503 F. Supp. at 1346 (Eighth Amendment violation where "the right of physically handicapped inmates to minimal levels of medical care has been systematically ignored"); *Palmigiano v. Garrahy*, 443 F. Supp. 956, 975-976 (D.R.I. 1977) (inadequate mental health care in state prison violated Eighth Amendment), *remanded for further consideration on other grounds*, 599 F.2d 17 (1st Cir. 1979); *Mitchell v. Untreiner*, 421 F. Supp. 886, 891 (N.D. Fla. 1976) (Eighth Amendment violation where no psychological or psychiatric treatment available for inmates with mental illness); *Battle v. Anderson*, 376 F. Supp. 402, 415 (E.D. Okl. 1974) (inadequate mental health care in state prison violated Eighth Amendment); *Newman v. Alabama*, 349 F. Supp. 278, 284 (M.D. Ala. 1972) (Eighth Amendment violation where "the large majority of mentally disturbed inmates receive no treatment whatsoever."), *aff'd in relevant part*, 503 F.2d 1320 (5th Cir. 1974), *cert. denied*, 421 U.S. 948 (1975); *Talley v. Stephens*, 247 F. Supp. 683, 687 (E.D. Ark. 1965) (forcing inmates with "serious physical handicaps" to perform labor that they were physically unable to perform, and denying access to medical care, violated Eighth Amendment); *see also Maclin v. Freake*, 650 F.2d 885, 889 (7th Cir. 1981) (reversing grant of summary judgment to State prison official in case where inmate with paraplegia claimed that he had been denied any physical therapy for almost a year).

[16] *See, e.g.*, *Coleman v. Wilson*, 912 F. Supp. 1282, 1305-1319 (E.D. Cal. 1995) (denial of adequate mental health care to inmates with

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refused to provide accommodations such as interpreters during medical treatment that are essential to enable inmates with disabilities to receive appropriate and safe treatment.[17]

Other Eighth Amendment cases involve the failure to protect inmates with disabilities from physical harm. Courts have found that States have violated the Eighth Amendment by assigning inmates with disabilities to certain housing units where the conditions were likely to lead to

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severe psychiatric disabilities), *appeal dismissed*, 101 F.3d 705 (9th Cir. 1996); *Madrid*, 889 F. Supp. at 1226 ("Defendants' response to the lack of adequate mental health care – and particularly the response of defendant Gomez, who has overall responsibility for the California Department of Corrections – reflects a deplorable, and clearly conscious, disregard for the serious mental health needs of inmates."); *Casey*, 834 F. Supp. at 1547-1550 ("appalling" conditions for inmates with serious mental illnesses: "Rather than providing treatment for serious mental illnesses, ADOC punishes these inmates by locking them down in small, bare segregation cells for their actions that are the result of their mental illnesses. These inmates are left in segregation without mental health care."); *Arnold on Behalf of H.B. v. Lewis*, 803 F. Supp. 246, 256-257 (D. Ariz. 1992) (state provided "grossly inadequate mental health care" for inmate with psychiatric disability); *see also Rouse v. Plantier*, 182 F.3d 192, 199 (3d Cir. 1999) (concluding, in class-action challenge to conditions for inmates with diabetes, that "[b]ased on the evidence in the summary judgment record, there may be one or more subgroups of plaintiffs as to whom particular aspects of the care allegedly provided was not consistent with Eighth Amendment requirements"); *Flowers v. Bennett*, 135 F. Supp. 2d 1150, 1156 (N.D. Ala. 2000) (denying defendants' motion for summary judgment in case involving denial of insulin to inmate with diabetes); *D.M. v. Terhune*, 67 F. Supp. 2d 401 (D.N.J. 1999) (approving consent decree in challenge by inmates with mental disabilities to State's denial of mental health treatment); *McNally v. Prison Health Servs.*, 46 F. Supp. 2d 49, 53-57 (D. Me. 1999) (denying State's motion for summary judgment in case brought by inmate with HIV who was denied medication).

[17] *See, e.g., Clarkson v. Coughlin*, 898 F. Supp. 1019, 1043 (S.D.N.Y. 1995) (denial of interpretive services and assistive devices to deaf inmates during medical treatment violated Eighth Amendment).

significant deterioration of individuals with disabilities.[18] Courts have also concluded that States unconstitutionally failed to protect disabled inmates from attacks by other inmates,[19] and that they failed to take constitutionally required steps to prevent inmates with mental disabilities from committing suicide.[20] Unfortunately, in some instances,

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[18] *See, e.g.*, *Madrid*, 889 F. Supp. at 1266 (assignment of inmates with mental disabilities to SHU violated Eighth Amendment because that assignment was "'very likely' to render them psychotic or otherwise inflict a serious mental illness or seriously exacerbate an existing mental illness"); *Walker v. State*, 68 P.3d 872, 884 (Mont. 2003) (confinement of inmate with mental illness in conditions that "cause[d] serious mental illness to be greatly exacerbated" violated state constitutional counterpart to the Eighth Amendment); *see also Austin v. Wilkinson*, No. 01-71, 2002 WL 32828650 at *2 (N.D. Ohio, Apr. 5, 2002) (approving settlement that, *inter alia*, "stops the placement and retention of inmates at the OSP [a "super-max" facility] who are seriously mentally ill"); *Jones'El v. Berge*, 164 F. Supp. 2d 1096, 1118 (W.D. Wis. 2001) (granting, in Eighth Amendment case, preliminary injunction prohibiting assignment of seriously mentally ill inmates to Supermax prison based on evidence "that Supermax is not appropriate for seriously mentally ill inmates because of the isolation resulting from the physical layout, the inadequate level of staffing and the customs and policies"); *Langley v. Coughlin*, 715 F. Supp. 522, 540 (S.D.N.Y. 1989) (denying state officials' motion for summary judgment on Eighth Amendment claim based, *inter alia*, on "the failure to screen out from SHU those individuals who, by virtue of their mental condition, are likely to be severely and adversely affected by their placement there").

[19] *See, e.g.*, *Freeman v. Berry*, No. 87-0259, 1994 WL 760820 at *2-*3 (W.D. Ky. May 19, 1994) (deliberate indifference to risk of attacks by other inmates on inmate with HIV); *Ruiz*, 503 F. Supp. at 1346 (failure to protect inmates with mental retardation from abuse and physical harm by other inmates violated Eighth Amendment); *see also Taylor v. Michigan Dep't of Corr.*, 69 F.3d 76, 81-84 (6th Cir. 1995) (inmate with mental retardation who was raped after being transferred to prison where inmates were housed in 60-to-a-room barracks presented evidence sufficient to overcome summary judgment on his Eighth Amendment claim).

[20] *See, e.g.*, *Simmons v. City of Philadelphia*, 947 F.2d 1042 (3d Cir. 1991) (failure to take steps to prevent suicides by inmates with serious psychological needs violated Constitution), *cert. denied*, 503 U.S. 985

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prison guards themselves have even targeted disabled inmates for assault, in violation of the Eighth Amendment.[21]

The cases demonstrate that States have violated rights secured to inmates with disabilities by constitutional provisions other than the Eighth Amendment as well. States have denied due process by failing to accommodate inmates' disabilities in the course of disciplinary proceedings.[22] They have also engaged in intentional discrimination that has deprived inmates with disabilities of access to constitutionally protected activities, such as

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(1992); *see also Gibson v. County of Washoe*, 290 F.3d 1175, 1187-1193 (9th Cir. 2002) (reversing grant of summary judgment to defendant based on claim that defendant was deliberately indifferent to the serious medical needs of inmate with manic depressive disorder, resulting in his death), *cert. denied*, 537 U.S. 1106 (2003); *Jacobs*, 228 F.3d at 395 (denying motion to dismiss based on allegations that defendants were deliberately indifferent by placing inmate who was a known suicide risk in a cell with "a significant blind spot and tie-off points" from which a person could hang herself); *Viero v. Bufano*, 901 F. Supp. 1387, 1393-1394 (N.D. Ill. 1995) (allegations of failure to provide accommodations such as medication, counseling, and observation for inmate "with a history of severe psychological and psychosocial problems" stated claim for deliberate indifference to suicide risk).

[21] *See, e.g., Parrish v. Johnson*, 800 F.2d 600, 605 (6th Cir. 1986) (prison guard violated Eighth Amendment when he assaulted inmate with paraplegia, forced him to sit in his own feces, taunted him with a knife, extorted food from him, and verbally abused him); *Madrid*, 889 F. Supp. at 1166-1167 (inmate with mental illness suffered second- and third-degree burns over one-third of his body when corrections officers bathed him in scalding water); *see also Mullen v. Smith*, 738 F.2d 317, 318 (8th Cir. 1984) (*per curiam*) (inmate's allegation that prison officials forcibly removed him from his bed and ordered him to walk – after he had suffered a spinal injury that left him unable to walk – stated a claim for violation of the Eighth Amendment).

[22] *See, e.g., Ruiz*, 503 F. Supp. at 1344 (failure to provide assistance necessary to enable inmates with mental retardation to understand and participate in disciplinary proceedings violated Constitution); *see also Bonner*, 714 F. Supp. at 425-426 (denying State's motion for summary judgment where deaf inmate claimed that refusal to provide sign language interpreter in disciplinary hearings denied due process).

use of prison law libraries and participation in prison religious services.[23]

Review of reported decisions in ADA prison cases reveals that inmates with disabilities have invoked the statute to challenge state prison conditions that closely resemble those that courts have held unconstitutional. Inmates have challenged the denial of basic needs such as accessible cells and toilet and shower facilities.[24] They also

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[23] *See, e.g., Nolley v. County of Erie*, 776 F. Supp. 715, 740-742 (W.D.N.Y. 1991) (segregation of inmate with HIV deprived her of access to law library and religious services in violation of First Amendment).

[24] *See, e.g., Kiman v. New Hampshire Dep't of Corr.*, 301 F.3d 13, 15-16, 24-25 (1st Cir. 2002) (reversing sovereign-immunity dismissal in ADA claim brought by inmate with amyotrophic lateral sclerosis who was denied accessible shower and toilet facilities), *vacated*, 310 F.3d 785 (1st Cir. 2002) (*en banc*), *district court judgment aff'd by equally divided court*, 332 F.3d 29 (1st Cir. 2003) (*en banc*), *vacated and remanded*, 541 U.S. 1059 (2004); *St. Pierre v. McDaniel*, 172 F.3d 58 (9th Cir. 1999) (unpublished) (reversing grant of summary judgment to State prison officials in ADA case alleging that denial of crutches deprived inmate of access to, *inter alia*, showers and medical facilities); *Fennell v. Simmons*, 162 F.3d 1161 (6th Cir. 1998) (unpublished) (reversing grant of summary judgment, on qualified immunity grounds, in ADA case brought by inmate with paraplegia confined to inaccessible jail); *Hicks v. Armstrong*, 116 F. Supp. 2d 287, 289-290 (D. Conn. 1999) (denying motion to dismiss ADA claim brought by inmate with paraplegia who was denied, *inter alia*, accessible shower and toilet facilities); *Temples v. Crow*, No. 99-1147, 1999 WL 1053120 at *1-*2 (M.D. Fla., Oct. 20, 1999) (denying motion to dismiss ADA claim alleging denial of accessible transportation, toilet, and shower facilities to inmate who used wheelchair); *Cooper v. Weltner*, No. 97-3105, 1999 WL 1000503 at *5-*6 (D. Kan. Oct. 27, 1999) (denying defendants' motion for summary judgment in ADA case brought by inmate with disability denied accessible shower facilities); *Purcell v. Pennsylvania Dep't of Corr.*, No. 95-6720, 1998 WL 10236 at *4-*5 (E.D. Pa., Jan. 9, 1998) (denying State's motion for summary judgment in ADA case challenging denial of accessible cell and shower facilities); *Kaufman v. Carter*, 952 F. Supp. 520, 523-524 (W.D. Mich. 1996) (denying defendants' motion for summary judgment in ADA case brought by inmate with amputations on both legs who was denied accessible shower and toilet facilities, resulting in injury); *Harrelson v. Elmore County*, 859 F. Supp. 1465,

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have challenged the refusal to provide needed interpreters during medical appointments, disciplinary hearings against them, and other quasi-judicial proceedings concerning the terms or length of their confinement.[25] Inmates

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1466 (M.D. Ala. 1994) (addressing ADA claim of inmate with paraplegia "denied use of his wheelchair and forced to crawl around the cell" and "not provided with either toilet or shower facilities designed for disabled persons"); *Noland v. Wheatley*, 835 F. Supp. 476, 480-481 (N.D. Ind. 1993) (denying motion to dismiss ADA claim brought by semi-quadriplegic inmate who used wheelchair and was placed for three months in cell with "no bed or other furniture, no running water, and only an open drain in the floor for disposal of bodily waste," was given "no means of washing his hands or cleaning either his colostomy or urostomy bags after emptying them," and was given inadequate medical care); *Outlaw v. City of Dothan*, No. 92-A-1219-S, 1993 WL 735802 at *1-*2 (M.D. Ala., Apr. 27, 1993) (denying defendants' motion for summary judgment in ADA case alleging denial of accessible shower facilities).

[25] *See, e.g.*, *Armstrong v. Davis*, 275 F.3d 849, 857-858 (9th Cir. 2001) (affirming, in relevant part, injunction granted to plaintiffs in ADA case involving State's failure to provide accommodations necessary to enable individuals with disabilities to participate meaningfully in parole and parole revocation hearings), *cert. denied*, 537 U.S. 812 (2002); *Chisolm v. McManimon*, 275 F.3d 315, 326 (3d Cir. 2001) (reversing grant of summary judgment to defendants in ADA case brought by deaf inmate denied, *inter alia*, interpreter during intake and medical evaluation); *Randolph v. Rogers*, 170 F.3d 850, 858 (8th Cir. 1999) (finding disputed issues of material fact in ADA case alleging failure to provide interpreter to deaf inmate in disciplinary hearings and provision of medical care); *Duffy v. Riveland*, 98 F.3d 447, 450-452 (9th Cir. 1996) (reversing grant of summary judgment to defendants in ADA case brought by inmate with hearing impairment denied qualified interpreter at disciplinary and classification hearings); *Brown v. King County Dep't of Adult Corr.*, No. C97-1909W, 1998 WL 1120381 at *2 (W.D. Wash., Dec. 9, 1998) (denying defendants' motion for summary judgment in ADA case brought by deaf inmate who was denied interpreter during communications with medical staff); *Rewolinski v. Morgan*, 896 F. Supp. 879, 881 (E.D. Wis. 1995) (granting *in forma pauperis* status in ADA case brought by deaf inmate who was denied interpreter at disciplinary hearings and medical appointments).

also have brought ADA suits to challenge the exclusion of inmates with disabilities from constitutionally protected activities such as religious services and use of the law library.[26] That body of case law further underscores the important role that Title II of the ADA plays in preventing and providing a remedy for constitutional violations.

C. Title II Is A Congruent And Proportional Response To The History And Likelihood Of Violations Of The Constitutional Rights Of Inmates With Disabilities

In the prison context, as in the access-to-courts context addressed in *Lane*, Title II is "an appropriate response to this history and pattern of unequal treatment." *Lane*, 541 U.S. at 530. As the previous sections of this brief demonstrate, the State's unparalleled control over the lives of inmates creates certain affirmative constitutional obligations on the part of the State, including the obligation to provide some reasonable accommodations so that inmates can have meaningful access to the food, shelter, and medical care that the State must provide

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[26] *See, e.g.*, *Love v. Westville Corr. Center*, 103 F.3d 558, 558-559 (7th Cir. 1996) (affirming judgment for plaintiff in ADA case brought by inmate with quadriplegia who was denied access to "the prison's recreational facilities, its dining hall, the visitation facilities that were open to the general inmate population," denied ability "to participate in substance abuse, education, church, work, or transition programs available to members of the general inmate population," and given only limited access "to the law library, the regular library, and the commissary"); *Kruger v. Jenne*, 164 F. Supp. 2d 1330, 1332 (S.D. Fla. 2000) (denying motion to dismiss ADA claim brought by blind inmate who was denied accommodations including, *inter alia*, a cane and "talking books"; as a result, he could not access the law library or other parts of the jail, or participate in recreation); *Montez v. Romer*, 32 F. Supp. 2d 1235, 1237 (D. Colo. 1999) (class action alleging, *inter alia*, that denial of accommodations left inmates with disabilities "unable to use law libraries" and "medical clinics").

to those it incarcerates. And States have repeatedly violated those constitutional rights – even after Congress enacted other legislation to attempt to protect the rights of inmates with disabilities. When considered in the light of that background, the same conclusion the Court reached in the access-to-courts context is warranted here: In the prison context, as well, Title II is plainly "'responsive to, or designed to prevent, unconstitutional behavior.'" *Id.* at 533 (quoting *City of Boerne*, 521 U.S. at 532).

1. Title II Focuses On State Conduct That Poses A Significant Threat To Inmates' Constitutional Rights, While Limiting Its Intrusion On State Prerogatives

Given the circumstances in which the Constitution itself requires accommodation of inmates' disabilities, and the many occasions when States have violated the Constitution by failing to provide such accommodations, the conduct prohibited by Title II poses an obvious threat to constitutional rights. Frequently, the accommodations needed by inmates with disabilities are relatively inexpensive and easy to provide. Installation of a grab bar to permit Goodman to use the toilet in his cell would impose little burden on the State, for example. Nor would it impose any undue burden on the State to remove during the day a wheelchair-using inmate's bed from his cell to permit him to move around – the accommodation sought by the plaintiff in *Miller*, who is also incarcerated at GSP. *See Miller*, 384 F.3d at 1254. When a state prison denies such a reasonable accommodation to an inmate with a disability, the long record of constitutional violations against inmates with disabilities provided Congress a strong "reason to believe," *City of Boerne*, 521 U.S. at 532, that the failure to provide the accommodation reflects

deliberate indifference rather than a constitutionally legitimate state interest. The statute thus targets conduct that has "a significant likelihood of being unconstitutional." *Ibid.*

Not all of the conduct Title II prohibits in the prison context violates the Constitution. But to the extent that Title II proscribes such constitutional conduct in the prison context, it permissibly does so "in order to prevent and deter unconstitutional conduct." *Hibbs*, 538 U.S. at 728. The statute's added margin of protection serves to ensure that actual constitutional violations do not escape the law's sanction – as they predictably will, for example, in cases where inmates are unable to prove that the particular defendants had the subjective mental state required to make out a constitutional claim. *Cf. Farmer*, 511 U.S. at 837 (Eighth Amendment violation requires subjective deliberate indifference). An inmate's inability to establish that the defendant had the requisite mental state may often reflect the inherent inability of incarcerated persons to gather evidence about the mental states of those who confine them, rather than the absence of an underlying constitutional violation.

By imposing on States the duty to provide reasonable accommodations to inmates with disabilities without a showing of a particular prison official's mental state, Title II thus helps to ensure that constitutional violations do not go unremedied. In parallel circumstances, this Court has recognized that Section 5 gives Congress power to dispense with proof of the mental state required to establish a constitutional violation. *See Lane*, 541 U.S. at 520 ("When Congress seeks to remedy or prevent unconstitutional discrimination, § 5 authorizes it to enact prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent, to carry out the basic objectives of the Equal Protection Clause."); *Hibbs*, 538 U.S. at 736 (Congress may enact prophylactic rules to prevent and

provide a remedy for "subtle discrimination that may be difficult to detect on a case-by-case basis").

Moreover, a number of features of the ADA focus the statute on conduct that is particularly likely to reflect a violation of the constitutional rights of inmates with disabilities. One key means by which the statute targets constitutional violations in the prison context is its "disability" definition, which individuals must satisfy to be eligible for protection. *See* 42 U.S.C. § 12132. Under that definition, a plaintiff must show that he has (or is perceived by the State to have) a condition that imposes "substantial[]" limitations on "major life activities." *Id.* § 12102(2); *see, e.g.*, *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 565 (1999) (emphasizing "the fundamental statutory requirement that only impairments causing 'substantial limitat[ions]' in individuals' ability to perform major life activities constitute disabilities").

That statutory language, which this Court has "interpreted strictly to create a demanding standard for qualifying as disabled," *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 197 (2002), limits protection to individuals who are very likely to have the kind of "serious medical needs" that require accommodation under the Eighth Amendment, *Estelle*, 429 U.S. at 104, as well as those who are especially likely to need accommodation to exercise the rights guaranteed to them under the Bill of Rights and the Due Process Clause. Individuals who satisfy that definition are particularly likely to have conditions that have historically been targets of discrimination. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 494-495 (1999) (Ginsburg, J., concurring) (ADA's disability definition targets an "historically disadvantaged[] class").

The ADA's requirement of "reasonable modifications," 42 U.S.C. § 12131, also limits the reach of the statute to conduct that is likely to violate the Constitution. As this Court emphasized in *Lane*, 541 U.S. at 531-532, that

requirement demands that States provide only those modifications that are "reasonable" and that "would not fundamentally alter the nature of the service provided." *See* 28 C.F.R. § 35.130(b)(7) (requiring "reasonable modifications" except where "making the modifications would fundamentally alter the nature of the service, program, or activity"); *see also Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 603-606 (1999) (plurality opinion) (interpreting Title II's "fundamental alteration" defense).

Where architectural barriers are at issue, the statute imposes stringent standards of accessibility only on facilities built or altered after the statute's 1992 effective date. *See* 28 C.F.R. § 35.151. For "older facilities, for which structural change is likely to be more difficult," States may avail themselves of "a variety of less costly measures" so long as they ensure that the plaintiff has access to the facility's services, programs, and activities. *Lane*, 541 U.S. at 532 (citing 28 C.F.R. § 35.150(b)(1)); *see also Miller*, 384 F.3d at 1267 ("[P]risoner access to programs need not be universal because a public entity need not make structural changes in existing facilities where other methods are effective in achieving compliance with this section.") (internal quotation marks and brackets omitted). "And in no event is the [State] required to undertake measures that would impose an undue financial or administrative burden, threaten historic preservation interests, or effect a fundamental alteration in the nature of the service." *Lane*, 541 U.S. at 532 (citing 28 C.F.R. §§ 35.150(a)(2), (a)(3)). These same substantive standards govern the federal Bureau of Prisons, and have since 1978, *see* Pub. L. No. 95-602, 92 Stat. 2982 (1978) (codified at 29 U.S.C. § 794), and there is no indication that they have proven onerous or unworkable.

The lower courts have recognized that "[t]erms like 'reasonable' and 'undue' are relative to circumstances, and the circumstances of a prison are different from those of a

school, an office, or a factory." *Crawford v. Indiana Dep't of Corr.*, 115 F.3d 481, 487 (7th Cir. 1997) (Posner, J.). Accordingly, they have determined that the "reasonable modification" analysis in the prison setting must take account of "[s]ecurity concerns, safety concerns, and administrative exigencies." *Love*, 103 F.3d at 561; *see also Cutter*, 125 S. Ct. at 2123 (reading "compelling governmental interest" standard in the Religious Land Use and Institutionalized Persons Act as one that should be "applied in an appropriately balanced way" in the prison context, taking account of "the urgency of discipline, order, safety, and security in penal institutions"); *cf. Spector v. Norwegian Cruise Lines Ltd.*, 125 S. Ct. 2169, 2180-2181 (2005) (reading requirement of "readily achievable" barrier removal in Title III of the ADA, 42 U.S.C. § 12182(b)(2)(A)(iv), as one that, as applied to cruise ships, should take account of concerns about shipboard safety and compliance with international legal obligations).

In so ruling, the lower courts have focused the statute's prohibitions even more precisely on those acts that are particularly likely to violate the constitutional rights of inmates with disabilities. When a State fails to provide a disabled inmate with an accommodation that could reasonably be provided without sacrificing legitimate penological interests such as security concerns or administrative imperatives, there is a substantial likelihood that the State's action violates the Constitution. *See, e.g.*, *Turner*, 482 U.S. at 89-90 (holding that a prison regulation is generally valid if it is "reasonably related to legitimate penological interests," but recognizing that prisons may be required to provide some "accommodation of . . . asserted constitutional right[s]"); *Rhodes v. Chapman*, 452 U.S. 337, 356 (1981) (infliction of pain without penological purpose violates Eighth Amendment).

The law governing Title II's damages remedy limits the statute's impact on legitimate state operations as well.

Punitive damages are not available under the statute. *See Barnes v. Gorman*, 536 U.S. 181, 188 (2002). The Prison Litigation Reform Act (PLRA), Pub. L. No. 104-134, tit. VIII (1996), further limits the damages available in this context by prohibiting recovery "for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. § 1997e(e). As in *Hibbs*, 538 U.S. at 739-740, the limits on damages recoverable for violations of Title II "'tend to ensure Congress' means are proportionate to ends legitimate under § 5.'" *Id.* at 739 (internal quotation marks omitted; quoting *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 647 (1999)).

Other provisions of the PLRA provide further protection for state interests. The PLRA imposes a number of restrictions on suits brought by inmates, including Title II suits. *See generally Nelson v. Campbell*, 541 U.S. 637, 649 (2004) (describing restrictions the PLRA imposes on inmate litigation); *Crawford-El v. Britton*, 523 U.S. 574, 596 (1998) (same). Of greatest importance here, the PLRA: (1) requires plaintiffs to exhaust available administrative remedies before bringing suit challenging prison conditions and thus provides the State actual notice of the alleged discrimination and an opportunity to resolve the matter internally, *see* 42 U.S.C. § 1997e(a); *Porter v. Nussle*, 534 U.S. 516, 524-532 (2002); (2) requires a district court to screen and dismiss *on its own motion* any prison-conditions suit that "fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief," 42 U.S.C. § 1997e(c); *accord* 28 U.S.C. § 1915A; (3) requires inmates filing *in forma pauperis* to pay the full filing fee (albeit over time), 28 U.S.C. § 1915(b); (4) denies *in forma pauperis* status to any inmate who has on three previous occasions had an action or appeal "dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted," except in cases of

"imminent danger of serious physical injury," *id.* § 1915(g); and (5) limits prospective relief in prison-conditions cases, *see* 18 U.S.C. § 3626; *Miller v. French*, 530 U.S. 327, 347 (2000).

Title II's rights and remedies target conduct that is particularly likely to violate the constitutional rights of inmates with disabilities, while carefully limiting the statute's intrusion on state prerogatives. The statute, especially when taken together with the provisions of the PLRA, readily qualifies as "reasonably prophylactic legislation," *Kimel*, 528 U.S. at 88, in the prison context.

2. The Court Of Appeals Erred In Concluding That Title II Is A Disproportionate Remedy For State Inmates

The court of appeals ruled that Title II represents a disproportionate remedy in the prison context. The court reasoned that Title II cannot be justified as enforcing Eighth Amendment rights because it applies to a range of "prison services, programs, and activities not affected by the Eighth Amendment." *Miller*, 384 F.3d at 1274. The court's determination was doubly erroneous.

First, the court of appeals artificially limited its consideration to applications of Title II that implicate Eighth Amendment rights. But as this brief demonstrates above, pp. 16-19, the fundamental constitutional rights Title II enforces include the requirements of the Equal Protection and Due Process Clauses and various Bill of Rights protections that have been incorporated in the Fourteenth Amendment, as well as the rights guaranteed by the Eighth Amendment's Cruel and Unusual Punishments Clause. When considered in light of the extensive record of state violations of *all* of these rights, Title II's sweep can hardly be said to be excessive.

Second, and more important, the very nature of prophylactic legislation is to prohibit some conduct that does not violate the Constitution; such legislation does so in an effort to ensure that actual constitutional violations do not go undeterred or unremedied. This Court has repeatedly recognized that Congress may enact prophylactic legislation under Section 5: "Congress 'is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment,' and may prohibit 'a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text.'" *Lane*, 541 U.S. at 533 n.24 (quoting *Kimel*, 528 U.S. at 81); *accord City of Boerne*, 521 U.S. at 518. Given the significant constitutional obligations States assume in the treatment of disabled inmates within their custody, and the massive record of violations of those obligations, a statute that reaches conduct that is not in and of itself unconstitutional is plainly congruent and proportional. "Difficult and intractable problems often require powerful remedies," *Kimel*, 528 U.S. at 88, and the history discussed above affords ample justification for applying Title II to prisons, where the State exercises virtually complete control over the lives of inmates.[27]

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[27] Even if the court of appeals were correct in concluding that Congress lacked power to apply Title II to aspects of prison life that (unlike the facts here) may have little connection to the affirmative constitutional obligations the State has to inmates with disabilities, its judgment would still warrant reversal in this case. Congress clearly had a strong Section 5 basis for applying Title II to a significant "class of cases," *cf. Lane*, 541 U.S. at 530-531, arising in the prison setting, *i.e.*, cases (such as this one) in which disabled inmates challenge discrimination (or seek accommodation) relating to basic mobility, sanitary, or medical needs, access to law libraries and religious exercise, protection from harm and abuse, or participation in disciplinary proceedings. Regardless of the existence of any other aspects of prison life that might lack a strong enough connection to the State's affirmative constitutional obligations, in this class of cases, discrimination or denial of accommodation poses a powerful and obvious threat to constitutional rights, and

(Continued on following page)

Furthermore, if Title II is not upheld as valid Section 5 legislation in the prison context, there is a significant prospect that Congress will be powerless to protect inmates with disabilities. If the Court concludes that Congress lacked Section 5 power to apply Title II to the prison context, the statute will provide no basis for *any* relief – damages or an injunction, whether against the State or its officials under *Ex parte Young* – unless the statute can be upheld as an exercise of Congress's commerce power. But respondents argued vigorously in the district court that "the Commerce Clause does not authorize Congress to regulate state correctional facilities under the Americans with Disabilities Act." Dt. Ct. Dkt. 31 at 7. Respondents have never abandoned that contention, which *Miller* specifically left open. *See* 384 F.3d at 1268 n.23. Accordingly, the State's challenge to Title II in this case is one that goes to the basic constitutionality of Title II in the prison context, rather than simply to the statute's abrogation of state sovereign immunity.

II. EVEN IF TITLE II WERE NOT VALID PROPHYLACTIC LEGISLATION IN THE STATE PRISON CONTEXT, THE STATUTE IS VALID REMEDIAL SECTION 5 LEGISLATION AS APPLIED TO CASES WHERE THE STATE ACTUALLY VIOLATED A PLAINTIFF'S CONSTITUTIONAL RIGHTS

Even if the Court does not agree that Title II is valid prophylactic legislation in the prison context, the judgment of the court of appeals must nonetheless be reversed.

The court of appeals concluded that Goodman's allegations – which were supported by evidence submitted

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the minimal extent to which the statute goes beyond the Constitution is more than amply justified by the significant record of constitutional violations by States in similar cases.

in the record below – stated a claim for a violation of the Eighth Amendment's Cruel and Unusual Punishments Clause in three respects. First, the State's confinement of Goodman to a cell in which he could not move his wheelchair imposed "total restraint twenty-three to twenty-four hours-a-day without penal justification." Pet. App. 18a. Second, by "refus[ing] to provide assistance," prison officials forced Goodman "to sit in his own bodily waste." Pet. App. 18a & n.10. Third, the State showed deliberate indifference by "knowingly providing no physical therapy and inadequate medical treatment, systematic denial of access to virtually all prison programs and activities because of his disability, and woefully inadequate and inhumane prison facilities for the disabled, such as toilets without the necessary support or handrails." Pet. App. 18a-19a. Respondents have not challenged in this Court the Eleventh Circuit's conclusion that those allegations, if proven, would establish violations of the Eighth Amendment.

Those facts are the same facts that form the basis for Goodman's Title II claim. Yet the court of appeals concluded that Congress lacked Section 5 power to provide a remedy under Title II for those same facts.

In the view of the court of appeals, Title II cannot be valid under Section 5 as applied to *any* prison conditions case unless it is valid under Section 5 for *all* such cases. *See Miller*, 384 F.3d at 1276 n.34. In so ruling, the court of appeals misread *Lane*. The court began by correctly observing that, "under *Lane*, conduct does not need to be unconstitutional to be validly proscribed by Congress." *Miller*, 384 F.3d at 1276 n.34. *Lane* upheld Title II as applied to an entire class of cases, "without any mention of the ADA violations being *circumscribed* by or *limited* to what would otherwise constitute an actual constitutional violation." *Ibid.* (emphasis added).

From its correct initial observation, however, the court of appeals drew the incorrect conclusion that Section 5 analysis must invariably proceed on a "context by context" basis that does not look to the facts of individual cases. 384 F.3d at 1276 n.34. But Congress's prophylactic power to prohibit conduct that is constitutional does not undermine Congress's remedial power to reach cases in which the defendant's conduct actually violates the Constitution. To the contrary, *Lane* itself makes clear that Title II should be upheld as applied to a case where the statute provides a remedy for a constitutional violation. In *Lane*, 541 U.S. at 531 & n.19, this Court reaffirmed the principle that a statute must be upheld if Congress had power to reach the particular fact setting addressed by the complaint – even if other applications of the statute might exceed congressional power. *Lane* applied that principle to hold that, in determining the Section 5 basis for Title II, the Court need not consider the statute, "with its wide variety of applications, as an undifferentiated whole." *Id.* at 530. Instead, the Court held that it "need go no further" than to conclude that the statute could be upheld in the access-to-courts context of the case before it. *Id.* at 531.

Although *Lane* upheld Title II of the ADA as prophylactic legislation as applied to a "class of cases" that went beyond the facts of the particular case, the Court previously applied the same principle in two cases that considered only whether Congress had remedial power to reach the particular facts before it: *United States v. Raines*, 362 U.S. 17 (1960), and *Griffin v. Breckenridge*, 403 U.S. 88 (1966). In *Raines*, the Court rejected the defendants' constitutional challenge to a provision of the Civil Rights Act of 1957, 42 U.S.C. § 1971(c). The Court did not contest the lower court's conclusion that the statute might, by its terms, reach conduct that was outside of Congress's power to regulate under its Fifteenth Amendment enforcement

power. Instead, in language on which *Lane* specifically relied, the Court held that "if the complaint here called for an application of the statute clearly constitutional under the Fifteenth Amendment, that should have been an end to the question of constitutionality." *Raines*, 362 U.S. at 24-25, *quoted in Lane*, 541 U.S. at 531 n.19. Because the complaint alleged conduct that Congress clearly had the power to reach – race discrimination by state actors – this Court held that the district court should "have gone no further and should have upheld the Act as applied in the present action." *Id.* at 26.

Similarly, in *Griffin*, 403 U.S. at 104, the Court recognized that the broad prohibition of private conspiracies in 42 U.S.C. § 1985(3) might well have applications that went beyond Congress's powers to enforce the Reconstruction Amendments. But it noted that cases like *Raines* had "long since firmly rejected" the "rule that required invalidation of an entire statute if any part of it was unconstitutionally overbroad." *Griffin*, 403 U.S. at 104. Instead, the proper inquiry "need go only to identifying a source of congressional power to reach the private conspiracy alleged by the complaint *in this case*." *Ibid.* (emphasis added). Because Congress clearly had authority under the Thirteenth and Fourteenth Amendments to reach the conduct alleged in the case before it (a private conspiracy to attack an out-of-state vehicle belonging to an African-American who was believed to be a civil rights worker, *see id.* at 89-90), the Court found "no occasion . . . to trace out [the statute's] constitutionally permissible periphery." *Id.* at 107.

This case is in the same posture as that of *Lane*, *Raines*, and *Griffin*. Whatever the outer boundaries of Title II's constitutionally permissible sweep may be, Congress plainly had Section 5 power to apply the statute here, where the defendants' acts violated not just Title II

but also the Constitution itself. This Court emphasized in *City of Boerne* that Section 5 gives Congress power to provide remedies for actual constitutional violations. *See City of Boerne*, 521 U.S. at 519-520; *see also Lane*, 541 U.S. at 558-560 (Scalia, J., dissenting) (Congress has Section 5 power to provide remedies for actual Fourteenth Amendment violations). As applied to the facts alleged in Goodman's complaint, Title II does just that. By abrogating sovereign immunity, it gives Goodman a damages remedy against the State itself for the conduct that violated his constitutional rights. Absent such congressional action, Goodman could not sue the State for such unconstitutional conduct under 42 U.S.C. § 1983. *See* U.S. Const., Amdt. 11; *see also Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64-71 (1989). Instead, if he were to pursue his claims through a Section 1983 suit against the individual state officials who violated his rights, those officials who may be difficult to identify individually, may be judgment-proof, and would in any event be entitled to invoke the doctrine of qualified immunity. *See Anderson v. Creighton*, 483 U.S. 635, 638 (1987).

In short, as applied to the facts of this case Title II does nothing more than provide a remedy for an actual violation of Goodman's constitutional rights. Congress's authority to enforce the Cruel and Unusual Punishments Clause, as incorporated in the Fourteenth Amendment's Due Process Clause, thus plainly constitutes "a source of congressional power to reach the [facts] alleged by the complaint in this case." *Griffin*, 403 U.S. at 104. Even if Title II were not valid prophylactic legislation in the prison context, the court of appeals erred in ruling that the statute could not validly abrogate state sovereign immunity in this case.

The Court must, however, still address the validity of Title II as prophylactic legislation in the prison context. Unless Title II is sustained as valid Section 5 legislation

on that prophylactic ground, Goodman may lack an opportunity to obtain complete relief on his ADA claim because the courts below could conclude that Goodman has not established a violation of his constitutional rights. But if this Court ultimately were to conclude that Title II of the ADA is not valid prophylactic legislation in the prison context, the Court should make clear that Goodman may nonetheless continue to litigate his Title II claims so long as he can establish that the alleged statutory violations also violated his constitutional rights.

CONCLUSION

For the reasons set forth above, the judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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UNITED STATES,

Petitioner,

v.

THE STATE OF GEORGIA *et al.*,

Respondents.

TONY GOODMAN,

Petitioner,

v.

THE STATE OF GEORGIA *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF THE AMERICAN ASSOCIATION ON MENTAL RETARDATION, THE ARC OF THE UNITED STATES, THE BAZELON CENTER FOR MENTAL HEALTH LAW, THE NATIONAL MENTAL HEALTH ASSOCIATION, THE NATIONAL ASSOCIATION OF COUNCILS ON DEVELOPMENTAL DISABILITIES, AND THE AMERICAN PSYCHOLOGICAL ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI* [1]

Amici are national organizations of mental disability professionals and citizens (more fully described in the Appendix) with longstanding concerns about constitutional and statutory protections for people with mental disabilities in the criminal justice system.

SUMMARY OF ARGUMENT

This case presents the issue of Congress' authority, under Section 5 of the Fourteenth Amendment, to enact Title II of the Americans with Disabilities Act in the context of state prisons. Although Petitioner's individual claim involves a physical disability, this Court's ruling will have a major impact on inmates with mental disabilities.

A number of factors influence the presence of individuals with mental retardation and severe mental illness in prisons and jails. In a background section, *amici* offer their understanding of these historical, legal, and social factors.

Within prisons and jails, inmates with mental disabilities have been subjected to documented mistreatment and discrimination in violation of the Constitution. While these violations include deprivations of Equal Protection and Due Process, *amici* will focus on discriminatory failure to provide needed treatment and habilitation, and on conditions of confinement that violate the Eighth Amendment rights of prisoners with mental disabilities.

Amici recognize that Title II is a statute of carefully limited scope, and understand that not every denial of treatment and habilitation necessarily falls within the ambit of the Act. But

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[1] This brief was written entirely by counsel for *amici*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief. All parties have given written consent to the filing of this brief.

many, assuredly, will. And when prisoners are treated in a discriminatory manner because of the existence or manifestations of their mental disability, the Eleventh Amendment should not be interpreted as creating a barrier between those inmates and the relief Congress has afforded them.

Congress addressed these problems with care and circumspection in enacting Title II. The balancing of individual rights and institutional interests reflected in the statute mirror the caution with which this Court has confronted constitutional issues in the context of prison administration. This balanced legislative approach reflects the level of congruence and proportionality that this Court has required for enactments under Section 5 of the Fourteenth Amendment. By creating a statutory remedy for these constitutional violations, Congress has avoided the necessity of repeated and extensive constitutional litigation in individual cases, and retained the opportunity to refine its remedies as experience with the Act may dictate.

BACKGROUND

From the earliest days of the Republic, individuals with mental disabilities have found themselves in the criminal justice system. Societal attitudes toward mental illness and developmental disabilities have influenced the disposition of such individuals, including incarceration in state prisons. *See, e.g.*, Dorthea L. Dix, *Remarks on Prisons and Prison Discipline* (1845, 1984 repr.); Norman Dain, *Concepts of Insanity in the United States 1789-1865*, at 129 (1964).

Today's correctional facilities continue to confine inmates with mental disabilities. In addition to individual criminal conduct, the presence of inmates with serious mental disabilities is influenced both by the legacy of past attitudes and by public policies States have adopted in more recent times.

Prisoners with serious mental illness.

Over the course of our nation's history, the boundaries between and distinctive roles of prisons and mental health facilities have been far from static. *See generally* Michael Stephen Hindus, *Prison and Plantation: Crime, Justice, and Authority in Massachusetts and South Carolina 1767-1878*, at 204-05 (1980); Gerald N. Grob, *The Mad Among Us: A History of the Care of America's Mentally Ill* 74-77 (1994); David J. Rothman, *Conscience and Convenience: The Asylum and Its Alternatives in Progressive America* (rev. ed. 2002).

But even after the two types of institutions had been clearly delineated in law and administrative practice, substantial numbers of individuals with serious mental illness have been incarcerated in state prisons.[2]

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[2] At the present time, although several attempts have been made to estimate the number of prisoners who have such mental illnesses, it is impossible to quantify the number of inmates who have serious mental illness with any degree of precision. *See, e.g.*, The President's New Freedom Commission on Mental Health, *Transforming Mental Health Care in America* 32 (2003) ("about 7% of all incarcerated people have a current serious mental illness"); American Psychiatric Association, *Psychiatric Services in Jails and Prisons* xix (2d ed. 2000) ("up to 5% are actively psychotic"). Other attempts to estimate the prevalence appear to have used a substantially more expansive definition of mental illness. *See, e.g.*, Bureau of Justice Statistics, U.S. Dept. of Justice, *Mental Health and Treatment of Inmates and Probationers* (July 1999) (16% of state prison inmates either identified as having "a mental condition" or having stayed overnight in a mental hospital). *Cf. Albertson's Inc. v. Kirkingburg*, 527 U.S. 555, 565 (1999) (ADA addresses only functional limitations "that are in fact substantial"). Differences in definitions of serious mental illness and wide variations in research methodology warrant considerable caution in evaluating the estimates from these and other sources.

Prisoners with mental retardation and other serious developmental disabilities.

The relationship between mental retardation[3] and the criminal justice system has a long and disturbing history. In the first half of the twentieth century, there was a widespread belief that people with mental retardation constituted a danger to society because of their perceived propensity to commit criminal acts.[4] *See, e.g.*, Nicole Rafter, *The Criminalization of*

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[3] For organizational purposes, this brief will separately address prisoners with mental illnesses and prisoners with mental retardation and other developmental disabilities. There is, however, a sense in which this dichotomy is potentially misleading. Mental illness and mental retardation are not mutually exclusive categories. Individuals with mental retardation may also have mental illness, and studies suggest that the incidence of mental illness among individuals with mental retardation is somewhat higher than it is in the general population. *See* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 45 (4th ed., text rev. 2000) ("Individuals with Mental Retardation have a prevalence of comorbid mental disorders that is estimated to be three to four times greater than in the general population."); AAMR, *Mental Retardation: Definition, Classification, and Systems of Supports* 172-75 (10th ed. 2002); Johannes Rojahn & Marc J. Tassé, *Psychopathology in Mental Retardation*, in American Psychological Association, *Manual of Diagnosis and Professional Practice in Mental Retardation* 147-56 (John W. Jacobson & James A. Mulick eds., 1996). Needless to say, the damage caused by failure of prison authorities to provide needed habilitation, mental health treatment, or both, is seriously compounded if the prisoner has both disabilities. *See, e.g.*, American Psychiatric Association, *Psychiatric Services in Jails and Prisons* 59 (2d ed. 2000) ("Inmates with this combination of difficulties are unfortunately the most likely to be preyed upon and ridiculed by other inmates. Their inability to process information rapidly or to comprehend instructions, their low frustration tolerance, and their impulsivity may have severe disciplinary consequences."). There is also reason for concern that their "behaviors will be misperceived as intentional rule infractions or attributed solely to mental retardation while serious mental illness goes untreated." *Id.*

[4] The public's fears were aggravated by assertions from mental disability professionals of the day that extraordinary percentages of crimes in society were committed by individuals with mental retardation. *See, e.g.*,

Mental Retardation, in *Mental Retardation in America: A Historical Reader* 232-57 (Steven Noll & James W. Trent, Jr., eds. 2004). Along with eugenic sterilization, lifelong segregation and incarceration were the centerpieces of the response to this perceived threat.[5] *See, e.g.*, James W. Trent, Jr., *Inventing the Feeble Mind: A History of Mental Retardation in the United States* 142-44 (1994). Often this segregation was accomplished in geographically isolated institutions, but in other cases it led to the establishment of specialized

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Henry Herbert Goddard, *Feeblemindedness: Its Causes and Consequences* 8–9 (1914) (estimating that as many as 50% of criminals might be "mentally defective"). *See generally* Henry Herbert Goddard, *The Criminal Imbecile* (1915); J. David Smith, *Minds Made Feeble: The Myth and Legacy of the Kallikaks* (1985).

[5] The vehemence with which these policies of segregation and isolation were argued is, to modern sensibilities, chilling. *See, e.g.*, Lewis M. Terman, *The Intelligence of School Children* 132-33 (1919) ("The feeble-minded . . . are by definition a burden rather than an asset, not only economically but still more because of their tendencies to become delinquent or criminal. To provide them with costly instruction for a few years, and then turn them loose upon society as soon as they are ripe for reproduction and crime, can hardly be accepted as an ultimate solution of the problem. The only effective way to deal with the hopelessly feeble-minded is by permanent custodial care."); Henry Carey, *A Plea for the Sterilization of Certain Defectives, Particularly the Feeble-Minded and Epileptic* 4-5 (1912) ("What shall we do with the feeble-minded and epileptic already existing? One school says vasectomy, another castration, and still another segregation. None of these is correct in whole but in part only. To reach the proper solution of this question both sterilization, in some form or other, and segregation must be carried out, castration or vasectomy being used as adjuncts to segregation, and going hand in hand with it."); W. E. Fernald, *The Burden of Feeblemindedness*, 17 J. Psycho-Aesthenics 87, 90 (Mar. 1912) ("The past few years have witnessed a striking awakening of professional and popular consciousness of the widespread prevalence of feeble-mindedness and its influences as a source of wretchedness to the patient himself and to his family, and as a causative factor in the production of crime, prostitution, pauperism, illegitimacy, intemperance and other complex social diseases . . . . They cause unutterable sorrow at home and are a menace and danger to the community.").

penal institutions, such as the "Virginia State Prison Farm for Defective Miscreants." Steven Noll, *Feeble-Minded in Our Midst: Institutions for the Mentally Retarded in the South 1900-1940*, at 117-20 (1995). Whether the confinement in a particular institution was denominated as civil or criminal, it is clear that the public's fear of people with mental retardation was central to its purpose.

As will be discussed below, the conditions under which inmates with mental retardation are confined may reflect the persistence of some of these views, and remain a source of serious concern.[6]

Factors influencing the incarceration of individuals with mental disabilities in prisons and jails today.

As with any prison inmate, the central reason for the incarceration of these individuals with disabilities is their own criminal conduct. But for prisoners who have mental illness or developmental disabilities, there are other causative factors worth noting.

One such factor, for many of these inmates, is the effect of their mental disabilities on the behavior that led to criminal

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[6] As with serious mental illness, there is no precise measurement of how many inmates in state prisons have mental retardation or other serious developmental disabilities. While the incidence of mental retardation in society is estimated at three percent or less, *see Atkins v. Virginia*, 536 U.S. 304, 309 n.5 (2002), there are indications that the numbers in prison populations in some States may be somewhat higher. One widely cited survey of correctional authorities places the incidence of mental retardation in federal and state prisons at 4.2%. Louis Veneziano & Carol Veneziano, *Disabled Inmates*, in *Encyclopedia of American Prisons* 157-61 (Marilyn D. McShane & Frank P. Williams III eds., 1996). *See generally* Joan Petersilia, *Doing Justice?: The Criminal Justice System and Offenders with Developmental Disabilities* 38-40 (California Research Policy Center 2000). Because of the different demographics involved in different types of crimes, the percentage could be slightly higher in state prisons than in the federal system.

charges. While it is not true that people with mental illness are unusually likely to commit criminal acts, much less acts of physical violence, there is often at least some causal relationship between an individual's mental illness and the criminal behavior that led to incarceration. *See, e.g.*, Paul S. Appelbaum, Pamela Clark Robbins & John Monahan, *Violence and Delusions: Data From the MacArthur Violence Risk Assessment Study*, 157 Am. J. Psychiatry 566, 566 (2000) ("although most acts of violence perpetrated by psychotic persons are not motivated by delusions, a substantial minority of their violent acts appears to be delusionally driven"); Keith Hersh & Randy Borum, *Command Hallucinations, Compliance, and Risk Assessment*, 26 J. Am. Acad. Psychiatry & Law 353 (1998); Bruce G. Link & Ann Steuve, *Psychotic Symptoms and the Violent/Illegal Behavior of Mental Patients Compared to Community Controls*, in *Violence & Mental Disorder: Developments in Risk Assessment* 137-59 (John Monahan & Henry J. Steadman eds., 1994).[7]

Similarly, for defendants who have mental retardation, several attributes associated with their disability may have influenced their behavior. As this Court has observed, "Because of their impairments, . . . by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." *Atkins v.*

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[7] Far more frequent than these crimes of violence are the many relatively minor offenses for which substantial numbers of individuals with mental disabilities are prosecuted. *See* Arthur J. Lurgio, Angie Rollins & John Fallon, *The Effects of Serious Mental Illness on Offender Reentry*, 68 Federal Probation 45, 46 (September 2004) (noting "recent adoption of law enforcement strategies that emphasize quality-of-life issues and zero tolerance policies in response to public-order offenses: loitering, aggressive panhandling, disturbing the peace, and urinating in public. These strategies have netted large numbers of the mentally ill for publicly displaying the symptoms of untreated [serious mental illness].").

Virginia, 536 U.S. 304, 318 (2002). *Amici* do not suggest, of course, that all such individuals should be absolved from responsibility or excused from imprisonment as punishment for criminal conduct. "[B]ut there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal responsibility." *Id.* As a result, offenders with developmental disabilities can be seen as "categorically less culpable than the average criminal." *Tennard v. Dretke*, 542 U.S. ___, 124 S. Ct. 2562, 2571 (2004) (quoting *Atkins*, 536 U.S. at 316). This observation is equally true for defendants facing non-capital sentencing. *See generally* Am. Bar Ass'n, *Standards for Criminal Justice* § 7-9.3 ("Evidence of mental illness or mental retardation should be considered as a possible mitigating factor in sentencing a convicted offender.").

But the nexus between mental disability and criminal conduct does not, of course, necessarily eliminate the practical likelihood that individuals with mental illness or mental retardation will end up in prison, or reduce the duration of their confinement. *See generally* Victoria Harris & Christos Dagadakis, *Length of Incarceration: Was There Parity for Mentally Ill Offenders?*, 27 Int'l J.L. & Psychiatry 387 (2004).

Several developments in the States have had the effect (mostly unintended) of increasing the number of prison inmates who have mental disabilities. First, a number of States have reduced or eliminated the availability of a complete defense based on mental disability. A few States have abolished the insanity defense completely,[8] and a larger number

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[8] *See* Idaho Code § 18-207 (Michie 1996); Kan. Stat. Ann. §§ 22-3219–3220 (1996); Mont. Code Ann. § 46-14-102 (2003); Utah Code Ann. § 76-2-305 (2003). *See also Foucha v. Louisiana*, 504 U.S. 71, 98 (1992) (Kennedy, J., dissenting). The Nevada Supreme Court invalidated

have restricted its availability to those defendants whose mental disability vitiated their ability to understand their actions.[9] Second, there has been movement away from the doctrine of "diminished capacity" or "diminished responsibility," which had served to reduce the sentence of defendants whose mental disabilities affected their culpability but fell short of the insanity defense.[10] Third, more than a dozen States have adopted the alternative verdict form of "guilty but mentally ill" (GBMI), which provides for the imprisonment of defendants who were mentally ill at the time of their offense, but who do not meet the requirements of the insanity defense.[11] In addition, state sentencing policies and guidelines may also have the unintended consequence of increasing the duration of confinement for some inmates with mental disabilities.[12]

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legislation which would have abolished the defense, but narrowed availability of the defense to a subset of defendants who were in "a delusional state" at the time of the offense. *Finger v. State*, 27 P.3d 66, 84-85 (Nev. 2001).

[9] Particularly in the decades since the public controversy that surrounded the Hinckley case, a number of state courts and legislatures have replaced the Model Penal Code's broader scope with the more restrictive provisions of the *M'Naghten* test. *See* Wayne R. LaFave, *Criminal Law* § 7.2 n.7 (2003). In these States, defendants who are "unable to conform their conduct to the requirements of law" because of their mental illness or mental retardation are subject to conviction and imprisonment.

[10] *See, e.g.*, Cal. Penal Code § 25(a) (West 1982). This legislation, enacted by popular initiative in 1982, overturned the judicially-created doctrine employed in cases such as *People v. Wells*, 202 P.2d 53 (Cal. 1949).

[11] Unlike diminished capacity, GBMI verdicts do not require reduction in the duration of a defendant's sentence, nor do they mandate that the inmate be provided with mental health treatment. *See* Henry J. Steadman et al., *Before and After Hinckley: Evaluating Insanity Defense Reform* 102-20 (1993) (implementation of GBMI in Georgia resulted in substantially longer sentences and longer duration of confinement).

[12] It does not appear that many States have placed as many structural restrictions on the consideration of mental disability as a mitigating factor in noncapital sentencing as the Federal Sentencing Guidelines have. *Cf.*

A much more troubling development is the apparent phenomenon of jails and prisons being transformed into the default disposition for individuals who might previously have received treatment or habilitation in clinical settings. Some have referred to this phenomenon as prisons becoming "the new asylums."[13] While we do not know all the precise ways that individuals with serious mental illness now find themselves in prisons rather than in treatment facilities,[14] some of the processes are becoming clear. One is that law enforcement officers may be increasingly likely to see criminal charges as the appropriate response to behavior that might also be characterized as indicative of the need for mental health services. This appears particularly likely if the police officers have been frustrated in past efforts to divert disrup-

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U.S. Sentencing Guidelines Manual § 5K2.13 (prior to amendment in 1998, downward departures were precluded for any inmate who had a substantial mental disability but was convicted of a crime involving violence). But provisions regarding repeat offenses may have the opposite effect. *See generally Almendarez-Torres v. United States*, 523 U.S. 224, 243 (1998) (recidivism laws "currently are in effect in all 50 States"). The increasing emphasis some States place on a defendant's "criminal history" may have the unintended effect of substantially extending the incarceration of individuals whose mental disability has led them to repeatedly commit relatively minor offenses. *See* Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 Colum. L. Rev. 1190, 1201 n.55 (2005) (citing substantial increases in some States in presumptive prison duration based on criminal history).

[13] *See, e.g., Impact of Mentally Ill Offenders on the Criminal Justice System: Hearing Before the House Subcomm. on Crime*, 106th Cong. 8 (statement of Rep. Ted Strickland). *See generally* E. Fuller Torrey et al., *Criminalizing the Seriously Mentally Ill: The Abuse of Jails as Mental Hospitals* (1992); Human Rights Watch. *Ill-Equipped: U.S. Prisons and Offenders with Mental Illness* (2003). This phenomenon has also been noted by journalists. *See, e.g.*, Fox Butterfield, *Prisons Replace Hospitals for the Nation's Mentally Ill*, N.Y. Times, Mar. 5, 1998, at A1.

[14] T. Howard Stone, *Therapeutic Implications of Incarceration for Persons with Severe Mental Disorders: Searching for Rational Health Policy*, 24 Am. J. Crim. L. 283, 291 (1997).

tive individuals into community mental health facilities.[15] In addition, there may also be substantial (and perverse) financial incentives to turn to the criminal justice system instead of treatment or habilitation in community settings. Robert D. Miller, *Economic Factors Leading to Diversion of the Mentally Disordered from the Civil to the Criminal Commitment Systems*, 15 Int'l J.L. & Psychiatry 1 (1992). These are often exacerbated by the chronic underfunding of community mental health and mental retardation systems. T. Howard Stone, *Therapeutic Implications of Incarceration for Persons with Severe Mental Disorders: Searching for Rational Health Policy*, 24 Am. J. Crim. L. 283, 291-96 (1997).

Once incarcerated, prison conditions can cause a substantial worsening of the symptoms an inmate had prior to incarceration.[16] *See generally Ford v. Wainwright*, 477 U.S. 399,

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[15] *See, e.g.*, Linda A. Teplin, *Policing the Mentally Ill: Styles, Strategies, and Implications in Jail Diversion for the Mentally Ill* 10, 12-14 (Henry J. Steadman ed., 1990); Richard J. Freeman & Ronald Roesch, *Mental Disorder and the Criminal Justice System: A Review*, 12 Int'l J.L. & Psychiatry 105, 107 (1989). *See generally* Am. Bar Ass'n, *Standards for Criminal Justice* § 7-2.5 cmt. at 40 ("mentally disturbed persons by their actions frequently violate minor criminal legislation and thus are subject to criminal arrest. . . . [P]olice officers who are unclear about their authority to process mentally disturbed persons, or who are disillusioned about mental health and mental retardation facility inaction in such cases, are likely to ignore their emergency custodial powers and pursue the criminal arrest procedures with which they are thoroughly familiar."); Linda A. Teplin & Nancy S. Pruett, *Police as Streetcorner Psychiatrist: Managing the Mentally Ill*, 15 Int'l J.L. & Psychiatry 139 (1992); J. Steven Lamberti & Robert L. Weisman, *Persons with Severe Mental Disorders in the Criminal Justice System*, 75 Psychiatric Q. 151, 153 (2004) (principal problems for law enforcement are lack of training about mental illness and lack of effective interaction with mental health service providers); Heidi S. Vermette, Debra A. Pinals & Paul S. Appelbaum, *Mental Health Training for Law Enforcement Professionals*, 33 J. Am. Acad. Psychiatry & Law 42 (2005).

[16] This problem appears to be especially severe for female prisoners. *See generally* Linda A. Teplin, Karen M. Abram & Gary M. McClelland,

402-03 (1986). And certain forms of incarceration are particularly likely to cause or exacerbate serious mental illness in some inmates. Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49 Crime & Delinquency 124, 130 (2003) (adverse symptoms include "rage, loss of control, paranoia, hallucinations, and self-mutilations"); *id.* at 148 (Mental health problems "exacerbated by the tendency of correctional systems to place a disproportionate number of previously mentally ill prisoners in supermax confinement, to ignore emerging signs of mental illness among the supermax population, and to fail to provide fully adequate therapeutic assistance to those prisoners who are in psychic pain and emotional distress."). *See generally Wilkinson v. Austin*, 545 U.S. __, 125 S. Ct. 2384, 2394-95 (2005).

While it is unlikely, absent physical injury or other traumatic event, that incarceration would produce mental retardation (or comparable dementia) in an individual who did not have mental retardation earlier in life, conditions of confinement may cause further mental deterioration.[17] *See Youngberg v. Romeo*, 457 U.S. 307, 327 (1982) (Blackmun, J., concurring) (appropriate "to include within the minimally adequate training required by the Constitution such training as is reasonably necessary to prevent a person's pre-existing self-care skills from *deteriorating* because of his commit-

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Mentally Disordered Women in Jail: Who Receives Services?, 87 Am. J. Pub. Health 604 (1997) (female jail inmates are more likely to have serious mental health problems but are less likely to have access to mental health treatment than male inmates); Howard M. Kravitz, James L. Cavanaugh, Jr. & Sandra S. Rigsbee, *A Cross-Sectional Study of Psychosocial and Criminal Factors Associated with Arrest in Mentally Ill Female Detainees*, 30 J. Am. Acad. Psychiatry & Law 380 (2002).

[17] *See generally Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 7 (1981) (describing "undisputed" findings "that the physical, intellectual, and emotional skills of some residents have deteriorated at Pennhurst").

ment") (emphasis in original, citations omitted). Providing habilitation to prevent deterioration and atrophy is no less essential in jails and prisons.

A final factor that may increase the number of individuals with mental disabilities in state prisons, or prolong their incarceration, is the enduring residue of fear and prejudice that long marked public attitudes toward people with these disabilities. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 464 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part) ("Prejudice, once let loose, is not easily cabined."); *Board of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring) ("Prejudice, we are beginning to understand, rises not from malice or hostile animus alone. It may result as well from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves."). Judges and juries responsible for conviction and sentencing are not always immune from such lingering sentiments, *see Olmstead v. L.C.*, 527 U.S. 581, 611 (1999) (Kennedy, J., concurring in the judgment) ("the line between animus and stereotype is often indistinct"), and this fact has the potential to produce longer sentences of imprisonment.[18] In some cases, it may even contribute to wrongful conviction. See generally *Atkins*, 536 U.S. at 317 ("some characteristics of mental retardation undermine the strength

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[18] There are some indications that the public perception problem is getting worse. *See* Jo C. Phelan et al., *Public Conceptions of Mental Illness in 1950 and 1996: What is Mental Illness and Why Is It to be Feared?*, 41 J. Health & Soc. Behav. 188 (2000) (while there is increased acceptance of people with milder mental illness, perception that individuals with psychotic illness are dangerous has more than doubled); Patrick W. Corrigan & Amy E. Cooper, *Mental Illness and Dangerousness: Fact or Misperception, and Implications for Stigma*, in American Psychological Association, *On the Stigma of Mental Illness: Practical Strategies for Research and Social Change* 165-79 (Patrick W. Corrigan ed., 2005).

of the procedural protections that our capital jurisprudence steadfastly guards"); *See generally* Margaret Edds, *An Expendable Man: The Near-Execution of Earl Washington, Jr.* (2003).

ARGUMENT

I. PRISONERS WHO HAVE MENTAL DISABILITIES ARE PARTICULARLY VULNERABLE TO THE MISTREATMENT AND DISCRIMINATION ADDRESSED BY THE ADA.

A. Failure to provide needed treatment or habilitation imperils the safety and health of prisoners with mental disabilities.

Among the most serious types of unconstitutional conduct that prisoners who have mental disabilities may suffer is the failure to provide needed mental health treatment or habilitation. The Punishments Clause of the Eighth Amendment requires the provision of needed medical care. *Estelle v. Gamble*, 429 U.S. 97, 102-04 (1976).[19] The constitutional rationale for this obligation applies as fully to mental disability treatment as it does to therapy for physical ailments or injuries.

Serious mental illness, if left untreated, can leave an inmate in the most excruciating form of mental agony. *Olmstead*, 527 U.S. at 609-10 (Kennedy, J., concurring in the judgment) ("It must be remembered that for the person with severe mental illness who has no treatment the most dreaded of confinements can be the imprisonment inflicted by his own mind, which shuts reality out and subjects him to the torment of voices and images beyond our own powers to describe.").

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[19] As this Court has repeatedly held, remedial legislation can permissibly extend beyond the Constitution's direct command. *See, e.g., City of Boerne v. Flores*, 521 U.S. 507, 518 (1997). By the same token, *amici* recognize that not every constitutional violation will necessarily come within the ambit of Title II.

See also Marjorie Rock, *Emerging Issues with Mentally Ill Offenders: Causes and Social Consequences*, 28 Admin. & Policy in Mental Health 165, 171 (2001) ("For a newly detained inmate there is often an increased risk of suicide, and for all incarcerated mentally ill persons there is often increased personal risk for becoming a victim as well as the potential for high rates of decompensation and deterioration."); Joel A. Dvoskin & Henry J. Steadman, *Chronically Mentally Ill Inmates: The Wrong Concept for the Right Services*, 12 Int'l J.L. & Psychiatry 203, 205 (1989) ("[M]entally ill inmates tend to encounter a whole range of brand new problems in prison, to which they may be especially susceptible due to their mental illness. Examples here include such things as predatory inmates, avoiding disciplinary infractions, visits, and authority problems."). *See* Richard J. Freeman & Ronald Roesch, *Mental Disorder and the Criminal Justice System: A Review*, 12 Int'l J.L. & Psychiatry 105, 110 (1989) ("In population, they are significantly more likely to be involved in 'incidents,' ranging from assault by other inmates, altercation with guards, and generally bizarre behavior, to self mutilation and suicide attempts."); Robert W. Dumond, *Confronting America's Most Ignored Crime Problem: The Prison Rape Elimination Act of 2003*, 21 J. Am. Acad. Psychiatry & Law 354, 355 (2003) (inmates with mental illness or developmental disabilities "especially vulnerable" to sexual victimization).

Documented instances of jail and prison inmates who are not provided adequate treatment for their serious mental illness are deeply troubling. *See, e.g.*, *Cody v. Hillard*, 599 F. Supp. 1025, 1058-59 (D.S.D. 1984) (failure to provide mental health treatment to inmates with "serious psychiatric needs," noting that "some of these inmates have experienced deterioration in physical health because their mental health needs have gone untreated."); *Balla v. Idaho State Board of Corrections*, 595 F. Supp. 1558, 1578 (D. Idaho 1984) (psychiatric care found "virtually nonexistent," representing "deliberate

indifference to the serious medical needs of the inmates"); *Mitchell v. Untreiner*, 421 F. Supp. 886, 891 (N.D. Fla. 1976) (jail provided "no psychological or psychiatric treatment" and inmates with mental illness were segregated in inadequate conditions). Far too frequently, when there is no serious effort to provide mental health treatment, the only semblance of treatment offered to inmates with serious mental illness is psychotropic medication, and often, in such circumstances, the medication is inappropriately (and dangerously) administered. *See, e.g., Langley v. Coughlin*, 715 F. Supp. 522, 540 (S.D.N.Y. 1989) (failure "to properly diagnose mental conditions, failure to prescribe proper medication and prescription of inappropriate medication, failure to provide any meaningful treatment other than medication"); *Battle v. Anderson*, 376 F. Supp. 402, 415 (E.D. Okla. 1974) (no professional psychiatric staff in prison and "only 'treatment' available at the penitentiary consists of temporary relief from 'distress' through sedation"). *See also Coleman v. Wilson*, 912 F. Supp. 1282, 1309-11 (E.D. Cal. 1995).[20]

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[20] Numerous cases have revealed deliberate indifference in the failure to provide adequate staffing for the treatment of inmates with serious mental illness. *See, e.g., Ramos v. Lamm*, 639 F.2d 559, 577-78 (10th Cir. 1980) (expert testimony that the lack of mental health services "contributes to inmate suffering and at times causes suicide and self-mutilation by inmates"); *Coleman*, 912 F. Supp. at 1315 (understaffing produces failure to provide an adequate program of suicide prevention); *Madrid v. Gomez*, 889 F. Supp. 1146, 1226 (N.D. Cal. 1995) (failure to provide mental health care "so clearly and grossly deficient that it only highlights defendants' striking indifference to the mental health" of inmates); *Tillery v. Owens*, 719 F. Supp. 1256, 1302 (W.D. Pa. 1989) ("Officials at SCIP have violated the eighth amendment with respect to psychiatric and psychological care in at least two ways: they have failed to provide adequate staffing; they have failed to maintain an environment conducive to treatment of serious mental illness."). In addition, courts have identified as a constitutional violation the failure to perform adequate screening and diagnosis when symptoms of mental illness are apparent. *See, e.g., Coleman*, 912 F. Supp. at 1305 ("Under the Eighth Amendment the defendants

Similarly, a prison or jail's deliberate indifference to needed habilitation for inmates with mental retardation or other substantial developmental disabilities can cause enduring, sometimes permanent, harm. For many individuals with mental retardation, being deprived of needed treatment and habilitation does not merely mean that they will fail to improve or to gain important skills; they may in fact lose crucial life skills that they had before they were imprisoned. This can mean the loss of the ability to communicate, perform daily self-care, remain physically safe, and to maintain even rudimentary emotional stability. *Cf. Pennhurst*, 451 U.S. at 7; *Youngberg*, 457 U.S. at 311 n.7. As one respected authority in the field has observed, "[i]f prison is viewed as a dangerous place for the nonretarded inmate, imagine the threat posed to the individual whose cognitive limitations render him or her vulnerable to the wishes of brighter and more exploitative inmates." George S. Baroff, *The Mentally Retarded Offender*, *in* American Psychological Association, *Manual of Diagnosis and Professional Practice in Mental Retardation*, at 320 (John W. Jacobson & James A. Mulick eds., 1996).[21] *See generally* Jane Nelson Hall, *Correctional Services for Inmates with Mental Retardation*, in *The Criminal Justice System and Mental Retardation: Defendants and Victims* 167-90 (Ronald

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are required to maintain a system in which inmates are able to make their need for mental health care known to staff competent to provide such care before inmates suffer unnecessary and wanton infliction of pain."). Beyond mere numbers, it is also essential that correctional officers receive adequate training in dealing with inmates who have mental disabilities. *See generally* Lisa Callahan, *Correctional Officer Attitudes Toward Inmates with Mental Disorders*, 3 Int'l J. Forensic Mental Health 37 (2004).

[21] *See Ruiz v. Estelle*, 503 F. Supp. 1265, 1346 (S.D. Tex. 1980), *aff'd in relevant part*, 679 F.2d 1115 (5th Cir. 1982) ("[P]rison officials have done little to protect these mentally handicapped inmates from the type of abuse and physical harm which they suffer at the hands of other prisoners.").

W. Conley, Ruth Luckasson & George N. Bouthilet eds. 1992).

And yet mistreatment and neglect of inmates with mental retardation continues to occur. *See, e.g.*, *Ruiz*, 503 F. Supp. at 1346 ("Their special habilitation needs are practically unrecognized by TDC officials, and they are subjected to a living environment which they cannot understand and in which they cannot succeed."); *Taylor v. Mich. Dep't of Corr.*, 69 F.3d 76, 81 (6th Cir. 1995) (failure to protect from rape inmate who had mental retardation). *See generally* George C. Denkowski & Kathryn M. Denkowski, *The Mentally Retarded Offender in the State Prison System: Identification, Prevalence, Adjustment, and Rehabilitation*, 12 Crim. Just. & Behav. 55, 62 (1985) (majority of surveyed state correctional officials acknowledged that inmates with mental retardation were "manipulated and victimized by the general prison population," including sexual exploitation).

In one sense, prisoners with mental disabilities have the same needs as individuals with comparable disabilities outside the prison context. But in another crucial sense, their situation is dramatically different. Unlike their counterparts in the rest of society, prisoners' access to mental health treatment or habilitation is totally controlled by prison authorities.[22] By the very nature of their confinement, prisoners with serious mental illness or mental retardation are deprived of all other avenues for addressing these essential needs. *See generally Farmer v. Brennan*, 511 U.S. 825, 833 (1994) (Having stripped prisoners "of virtually every means of self-protection

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[22] There are indications that the problem of untreated prisoners with severe mental illness may be getting worse. *See, e.g.*, Ronald W. Manderscheid, Aliya Gravesande & Ingrid Goldstrom, *Growth of Mental Health Services in State Adult Correctional Facilities 1988 to 2000*, 55 Psychiatric Services 869 (2004) ("The growth in prison facilities and the growth in prisoner populations are outstripping the more meager growth in mental health services.").

and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course.").

B. Prisoners with mental disabilities have been subjected to harmful neglect and mistreatment.

In addition to the central concerns about failure to provide needed treatment and habilitation, prisoners with mental disabilities face discriminatory treatment that is unrelated to legitimate penological interests. For example, the practice of automatically or routinely assigning prisoners with symptoms of mental illness to "administrative segregation" units is particularly troubling.[23] "There is a general consensus among

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[23] In this context, *amici* are using the term "segregation" in the sense that it is generally employed in the management of prisons. *See, e.g.*, American Psychiatric Association, *Psychiatric Services in Jails and Prisons* 5 (2d ed. 2000) ("Inmates who are in current, severe psychiatric crisis, including but not limited to acute psychosis and suicidal depression should be removed from segregation until such time as they are psychologically able to tolerate that setting."). The term segregation is, of course, capable of different meanings. In other disability contexts, it often refers to the provision of mental retardation services in facilities or locations set apart from nondisabled individuals. *See, e.g., City of Cleburne*, 473 U.S. at 462 (Marshall, J., concurring in the judgment in part and dissenting in part) ("A regime of state-mandated segregation and degradation soon emerged that in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow. Massive custodial institutions were built to warehouse the retarded for life . . . ."). *See* 42 U.S.C. § 12101(5) ("[I]ndividuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, . . . [and] segregation . . . .").

While there is severe criticism in the disability community of provision of services in segregated settings, *see, e.g.*, Joseph P. Shapiro, *No Pity: People with Disabilities Forging a New Civil Rights Movement* 142 (1993), the extraordinary vulnerability of prison inmates who have mental retardation may sometimes require that their confinement and habilitation occur in settings that provide sufficient protection from other inmates. However, this in no way justifies placing vulnerable inmates with men-

clinicians that placement of inmates in settings with 'extreme isolation' is contraindicated because many of these inmates' psychiatric conditions will clinically deteriorate or not improve." National Commission on Correctional Health Care, *Standards for Health Services in Prisons* 243 (2003).

Nevertheless, some States continue to confine prisoners with serious mental illness in unconstitutional conditions that can only exacerbate their condition. *See, e.g.*, *Jones'El v. Berge*, 164 F. Supp. 2d 1096, 1118 (W.D. Wis. 2001) (conditions of inmates with serious mental illness deteriorating in supermax unit); *Madrid v. Gomez*, 889 F. Supp. 1146, 1267 (N.D. Cal. 1995) (segregation unit cruel and unusual for inmates who are mentally ill and those who "are at an unreasonably high risk of suffering serious mental illness as a result of present conditions" in the segregated unit); *Langley v. Coughlin*, 715 F. Supp. 522, 540 (S.D.N.Y. 1989) (supermax unit housing "mentally ill inmates whose conditions involve dramatic outbursts of screaming, self-mutilation, attempted or staged suicides, throwing of feces and garbage, fires and other distressing behavior" severely affecting other inmates with mental illness); *Walker v. State*, 68 P.3d 872, 885 (Mont. 2003) (describing conditions of confinement and mistreatment of a prisoner with mental illness as "an affront to the inviolable rights of human dignity possessed by the inmate and that such punishment constitutes cruel and unusual punishment when it exacerbates the inmate's mental health condition" and therefore is a violation of state constitutional protections).[24]

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tal retardation in "segregation units," as the term is used in the correctional context.

[24] *See also Casey v. Lewis*, 834 F. Supp. 1477, 1548 (D. Ariz. 1993) ("Despite their knowledge of the harm to seriously mentally ill inmates ADOC routinely assigns or transfers seriously mentally ill inmates to [lockdown and segregation units]. . . . In most cases, the inmates are

II. THE ADA'S PROTECTION OF THE RIGHTS OF INMATES WITH DISABILITIES IS CONSISTENT WITH THE TRADITION OF DEFERENCE TO CORRECTIONAL OFFICIALS.

This Court has repeatedly emphasized the importance of deference to state correctional authorities in the management of prisons. *See, e.g., Turner v. Safley*, 482 U.S. 78, 84-85 (1987) ("Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources"). *Amici* appreciate the extraordinary difficulties involved in maintaining order in potentially unstable, and even perilous, settings, and recognize the "peculiar and restrictive circumstances of penal confinement." *See Jones v. North Carolina Prisoners' Union*, 433 U.S. 119, 125 (1977). Indeed, the appropriate care of inmates with mental disabilities requires that the institutions in which they are confined function safely and effectively.

But the deference to prison authorities that this Court has recognized cannot excuse discriminatory treatment of individuals with mental disabilities. "The Constitution does not mandate comfortable prisons, but neither does it permit inhumane ones." *Farmer*, 511 U.S. at 832 (internal citation omitted). Neither the principle of judicial deference to correctional officials nor the broader dictates of federalism require the courts to cast a blind eye to the damaging neglect and discrimination faced by some of the nation's prison inmates with mental disabilities.

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locked down because of behavior resulting from their mental illness," with the decisions made by security, rather than medical, personnel.); *Arnold ex rel. H.B. v. Lewis*, 803 F. Supp 246, 256 (D. Ariz. 1992) (inmate with mental illness was provided "grossly inadequate mental health care . . . . Rather, defendants placed plaintiff in lock down as punishment for the symptoms of her mental illness and as an alternative to providing mental health care.").

Prisoners have constitutional rights that survive even the deprivation of physical liberty that is the essence of imprisonment. *Vitek v. Jones*, 445 U.S. 480, 493-94 (1980). *See also Turner*, 482 U.S. at 84 ("Prison walls do not form a barrier separating prison inmates from the protections of the Constitution."). Those rights are protected by, inter alia, the Punishments Clause of the Eighth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. They are rights of particular importance to prison inmates with mental disabilities, whose extraordinary vulnerability to mistreatment is a source of serious concern.

Concerned about the pervasive and destructive discrimination it found that individuals with disabilities confronted in public services, and after extensive investigation, Congress codified disability rights and created remedies for their enforcement in Title II of the Americans with Disabilities Act. It did so in a way that clearly encompasses mistreatment and discrimination encountered in prisons. *See Penn. Dep't of Corr. v. Yeskey*, 524 U.S. 206 (1998).

However, Congress was mindful of the practical differences between disability discrimination and other forms of invidious discrimination it had addressed in other statutes, such as race and gender discrimination.[25] Concerned about the potential costs and disruption of implementing the ADA,

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[25] The fact that Congress, in 1990, crafted a remedial scheme that differed from those designed for racial or gender discrimination certainly does not imply in any way that disability discrimination is a problem of secondary importance. While all invidious prejudice has common roots and features, the efforts to confront its harmful effects involve different templates. For example, racial and gender discrimination have not manifested themselves identically in our history, nor have the necessary remedial measures been exactly the same. The same is true with disability discrimination. Far from betraying a lesser concern about the harms of disability discrimination, Title II's mandate that its enforcers take potential costs and disruptions into account in individual cases suggests that Congress was mindful that its provisions should be proportional to the problem.

it limited the statute's remedial scope, requiring, for example, only "reasonable modifications" of programs and facilities. 42 U.S.C. § 12131(2) (1990). The mandate that courts only require "reasonable modifications" is, in fact, not at all dissimilar from the factors of reasonableness in constitutional remedies in prison cases that this Court announced in *Turner*, 482 U.S. at 89-91.[26] It means that legitimate penological interests, such as security concerns, *see O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987), and rehabilitative interests, *id.* at 351, can, upon a proper showing, prevail over disability claims under the statute.[27]

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[26] While the *Turner* test applies disability claims raised under the Due Process and Equal Protection Clauses, it does *not* apply to cases arising under the Eighth Amendment, where the less deferential "deliberate indifference" standard is used. *Hope v. Pelzer*, 536 U.S. 730, 738 (2002). "This is because the integrity of the criminal justice system depends on full compliance with the Eighth Amendment." *Johnson v. California*, 543 U.S. ___, 125 S. Ct. 1141, 1150 (2005). The remedies enacted by Congress in Title II are so carefully crafted that they are proportional to both standards.

[27] *Amici* are unaware of cases in which lower courts, in implementing Title II, have required actions by prison officials that substantially exceed the requirements of the Constitution. If a pattern of such overly-demanding orders were to occur in the future, appellate review could, of course, ensure that unwarranted interference with correctional authorities would not be imposed.

Indeed, another advantage of permitting Congress to address the problem of disability discrimination is that the legislative process is uniquely capable of adjusting and fine-tuning its remedies based on the practical experience in a statute's implementation. Although Congress drafted Title II in terms that clearly apply to state prisons, it did not address the issue of prison compliance with specificity. *Yeskey*, 524 U.S. at 211-12. If correctional officials in the States were to conclude, at some future time, that courts were imposing excessive or unduly intrusive requirements under Title II, it seems likely that they would find a receptive and sympathetic hearing in the Congress. *See generally* 18 U.S.C. § 3626 (1997) (Prison Litigation Reform Act).

Depriving prisoners with mental disabilities of needed treatment or habilitation will seldom, if ever, have "a valid, rational connection," *Turner*, 482 U.S. at 89, to the legitimate government interest in prison security, and it certainly cannot be justified on rehabilitative grounds. As noted above, prisoners with these disabilities will obviously not have available to them "alternative means of exercising the right" to receive such treatment or habilitation. *Id.* at 90. And it can hardly be contended that providing needed treatment to prisoners with serious symptoms of mental illness or habilitation to inmates who have mental retardation will have some deleterious impact on guards and other inmates.

Indeed, it is the *failure* to provide such treatment or habilitation that imperils the safety of guards and fellow prisoners even as it does potentially irreparable harm to the health and safety of the inmate who has the disability. *See Washington v. Harper*, 494 U.S. 210, 225-26 (1990) ("Where an inmate's mental disability is the root cause of the threat he poses to the inmate population, the State's interest in decreasing the danger to others necessarily encompasses an interest in providing him with medical treatment for his illness."). Finally, prison authorities cannot claim that the alternative, i.e. providing needed treatment or habilitation, is impractical or "unavailable." Successful prison treatment and habilitation programs have been implemented by a number of States. Denying the practicality of such treatment would surely be "an exaggerated response to prison concerns." *Turner*, 482 at 90 (internal quotation omitted).[28]

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[28] *Turner* also mentions as a consideration the impact "on the allocation of prison resources generally." 482 U.S. at 90. However, when the right at issue is grounded in the Eighth Amendment, States cannot justify "deliberate indifference" on the basis of mere fiscal savings. After all, it would not be cost-free to set a prisoner's broken leg. *Cf. Estelle v. Gamble*, 429 U.S. 97 (1976).

Leaving the serious mental illness of a prisoner untreated, or allowing the deterioration of his mental condition or ability to cope with the harsh demands of prison life by failing to provide needed treatment or habilitation, cannot be justified.

Title II is an appropriate tool to address a very serious problem. Making it unavailable in damage actions would have the paradoxical (and arguably perverse) effect of requiring prison disputes about disability discrimination to be litigated as constitutional cases. This would both fail to recognize the seriousness of the problem, and also reduce the flexibility with which it can be addressed. Principles of federalism do not require such a drastic and harmful result.

CONCLUSION

For the foregoing reasons, *amici* urge that the judgment of the Court of Appeals be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

The American Association on Mental Retardation ("AAMR") is the nation's oldest and largest interdisciplinary organization of professionals and other persons who work exclusively in the field of mental retardation. AAMR promotes humane policies, sound research, and effective practices, for people with intellectual disabilities.

The Arc of the United States (formerly known as the Association for Retarded Citizens of the United States), through its 875 state and local chapters, is the largest national voluntary organization in the United States devoted solely to the welfare of the more than seven million children and adults with mental retardation and their families.

The Bazelon Center for Mental Health Law is a national public interest organization founded in 1972 to advocate for the rights of individuals with mental disabilities. The Bazelon Center has engaged in litigation, administrative advocacy, and public education to promote equal opportunities for individuals with mental disabilities. Much of the Center's work involves efforts to remedy disability-based discrimination through enforcement of the ADA.

The National Mental Health Association ("NMHA") is the country's oldest and largest mental health organization representing all aspects of mental health and mental illness. As an organization dedicated to achieving a just, humane and healthy society in which all people are accorded respect, dignity and the opportunity to achieve their full potential free from stigma and prejudice, the NMHA is deeply committed to realizing the promise of the Americans with Disabilities Act and to ending the widespread neglect and discrimination experienced by people with mental illness in penal confinement.

The National Association of Councils on Developmental Disabilities ("NACDD") is a national organization consisting of 55 State and Territorial Developmental Disabilities Councils. NACDD advocates and works toward positive system change on behalf of individuals with developmental disabilities and their families. NACDD supports the removal of all barriers against persons with developmental disabilities to ensure their full participation in society.

The American Psychological Association (APA) is a voluntary, nonprofit scientific and professional organization with more than 155,000 members and affiliates. Since 1892, the APA has been the principal association of psychologists in the United States. Its membership includes the vast majority of psychologists holding doctoral degrees from accredited universities in the United States. An integral part of the APA's mission is to increase and disseminate knowledge regarding human behavior and to foster the application of psychological learning to important human concerns.

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In The
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner

v.

STATE OF GEORGIA, *et al.*

TONY GOODMAN,
Petitioner

v.

STATE OF GEORGIA, *et al.*

On Writs Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

STATEMENT OF FORMER PRESIDENT GEORGE H.W. BUSH AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

As the President who pressed for the enactment of the Americans with Disabilities Act ("ADA") and signed it into law, I have a direct and personal interest in the defense of the ADA and the preservation of the important safeguards it provides to disabled Americans. This brief is filed on the broad issue of whether Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131 to 12165, is a proper exercise of Congress's power under Section 5 of the 14th Amendment.

STATEMENT

On July 26, 1990, I had the privilege and honor of signing into law the ADA, comprehensive civil rights legislation intended to signal the end to unjustified segregation and exclusion of persons with disabilities from mainstream American life. *See Statement on Signing the Americans with Disabilities Act of 1990*, 2 Pub. Papers 1070, 1071 (July 26, 1990) (*"ADA Signing Statement"*). With the signing of the ADA, every man, woman, and child with a disability could pass through once-closed doors into a bright new era of equality, independence, and freedom. *See Remarks on Signing the Americans with Disabilities Act of 1990*, 2 Pub. Papers 1067, 1068 (July 26, 1990) (*"ADA Signing Remarks"*).

July 26, 1990 was a landmark occasion for me and for all Americans because, with the signing of the ADA, our country made an unequivocal statement to the world that Americans will not accept, will not excuse, and will not tolerate discrimination against persons with disabilities. *See ADA Signing Remarks* at 1069. The ADA works because it embodies what must be at the heart of all civil rights

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[1] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court, pursuant to Supreme Court Rule 37.3(a). No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amicus curiae* or its counsel, made a monetary contribution to the preparation or submission of this brief.

struggles: the spirit of inclusiveness, the devotion to individual rights, and equal opportunity. *See Remarks Commemorating the First Anniversary of the Signing of the Americans with Disabilities Act of 1990*, 2 Pub. Papers 963, 964 (July 26, 1991). It ensures that no disabled American will ever again be deprived of the basic guarantee of life, liberty, and the pursuit of happiness. *See ADA Signing Remarks* at 1068.

The ADA was enacted to address discrimination against persons with disabilities that permeated our society, including discrimination by public agencies in the delivery of public services. *See ADA Signing Statement* at 1070; *Americans with Disabilities Act of 1989: Hearings on S. 933 Before the Senate Comm. on Labor and Human Resources and the Subcomm. on the Handicapped*, 101st Cong. 808-09, 815-17 (1989) (prepared statement of Hon. Richard L. Thornburgh, Attorney General of the United States) (*"Thornburgh Senate Statement"*); *Americans with Disabilities Act of 1990: Hearings on H.R. 2273 Before the House Comm. on the Judiciary and the Subcomm. on Civil and Constitutional Rights*, 101st Cong. 198-99, 206-07 (1989) (prepared statement of Attorney General Thornburgh) (*"Thornburgh House Statement"*).

In 1986, I personally accepted, on behalf of President Reagan, a report from the National Council on Disability ("NCD") entitled "Toward Independence." NCD is a congressionally established Council. All 15 members of the Council at that time had been appointed by President Reagan. *See ADA Signing Statement* at 1070.

The report recommended enactment of comprehensive legislation to ban discrimination against persons with disabilities. *See id.* Specifically, NCD found that historically society has tended to segregate and isolate individuals with disabilities, and despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem.

NCD also found that discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services.

Further, NCD found that unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, or religion, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination. The NCD findings, among others, are incorporated in Section 2 of the ADA, 42 U.S.C. Section 12101.

My decision to embrace the ADA was based on two key factors. First, the comprehensive character of the legislation was a significant factor. *See ADA Signing Statement* at 1070. Given the pervasive nature of discrimination faced by individuals with disabilities and the wide range of barriers faced by such individuals in both private and public services, it was critical that the legislation be comprehensive and cover both public and private entities. *See Thornburgh Senate Statement*; *Thornburgh House Statement*. It would be a travesty indeed to ban discrimination by private entities and condone it by public entities, the very entities that should lead by example.

My Administration recognized that then-existing civil rights laws were inadequate. For example, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Section 794, only covered recipients of federal assistance. It did not cover services provided by public agencies that did not receive federal aid.

Thus, Section 504 left broad areas of disability discrimination untouched or inadequately addressed. Many persons with disabilities in this nation still lived in an intolerable state of isolation and dependence. In 1990, despite the existence of laws such as Section 504 of the Rehabilitation Act, persons with disabilities were still too often shut out of the economic and social mainstream of

American life. The unreasonable failure to eliminate attitudinal, architectural, and communication barriers in employment, transportation, public accommodations, public services, and telecommunications denies persons with disabilities an equal opportunity to contribute to and benefit in a meaningful way from the richness of American society. *See ADA Signing Statement* at 1070; *Thornburgh Senate Statement* at 809; *Thornburgh House Statement* at 198-99.

In the 20 years preceding the enactment of the ADA, civil rights legislation protecting disabled persons had been enacted in a piecemeal fashion. Thus, federal laws prior to the ADA were like a patchwork quilt in need of repair. There were holes in the fabric, serious gaps in coverage that left persons with disabilities without adequate civil rights protections. To be effective in addressing the pervasive discrimination by public agencies, among others, the ADA needed to be cohesive, coordinated, and comprehensive. *See Thornburgh Senate Statement* at 812; *Thornburgh House Statement* at 201.

Second, the ADA was modeled on existing federal civil rights laws prohibiting discrimination on the basis of disability. These laws, such as Section 504, have proven to provide the proper balance between the rights of persons with disabilities and the legitimate concerns of states. The ADA also used as its model the panoply of civil rights laws prohibiting discrimination on the basis of race, color, national origin, religion, and sex. *See Thornburgh Senate Statement* at 810, 813-15, 818; *Thornburgh House Statement* at 201-03.

In conclusion, I recognize that no single piece of legislation can alone change longstanding perception or misperceptions; regrettably, attitudes can only be reshaped gradually. One of the keys to this reshaping process, however, is to increase contact between and among people with disabilities and their nondisabled peers. And an essential component of that effort was the enactment of a comprehensive law that promotes the integration of people

with disabilities into all aspects of America life. This goal cannot be accomplished without Title II's ban on discrimination in all state programs and activities. *See Thornburgh Senate Statement* at 819; *Thornburgh House Statement* at 212.

CONCLUSION

For the reasons set forth above and in petitioners' briefs, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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UNITED STATES OF AMERICA,

Petitioner,

v.

STATE OF GEORGIA, *et al.*,

Respondents.

TONY GOODMAN,

Petitioner,

v.

STATE OF GEORGIA, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF THE HONORABLE DICK THORNBURGH AND THE NATIONAL ORGANIZATION ON DISABILITY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether Subtitle A of Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131-12134, is a proper exercise of Congress' power under § 5 of the Fourteenth Amendment.

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INTEREST OF AMICI CURIAE[1]

Amici Curiae, Dick Thornburgh and the National Organization on Disability ("N.O.D."), respectfully urge the Court to hold that Subtitle A of Title II of the Americans With Disabilities Act, 42 U.S.C. §§ 12131-12134, is a proper exercise of Congress' power under § 5 of the Fourteenth Amendment and therefore validly abrogates the sovereign immunity of the States under the Eleventh Amendment.

Dick Thornburgh served as Governor of Pennsylvania, Attorney General of the United States under Presidents Reagan and Bush, and the highest-ranking American at the United Nations. As Attorney General from 1988 to 1991, Thornburgh advocated for Congress' passage of the Americans with Disabilities Act ("ADA"). He subsequently developed regulations implementing that legislation. Attorney General Thornburgh is a founding member of N.O.D. and Vice-Chairman of the World Committee on Disability. In 2001 he received the George Bush Medal for his service to persons with disabilities. Attorney General Thornburgh is currently counsel to Kirkpatrick & Lockhart Nicholson Graham LLP.

The mission of the National Organization on Disability is to expand the participation and contribution of America's 54 million men, women, and children with disabilities in all aspects of life. For more than 20 years, N.O.D. has built and sustained programs that raise disability awareness, make America's communities accessible, and provide opportunities for employment and growth. N.O.D. joined with other disability organizations and advocates in the effort to enact the ADA. N.O.D.'s leadership includes Honorary Chairman George H. W. Bush, Chairman and President Michael R. Deland, and a Board of Directors that includes Tom Ridge, business leaders, and prominent disability advocates.

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[1] *Amici Curiae* certify that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *Amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief. The parties have filed letters consenting to the filing of this brief with the Clerk of the Court.

SUMMARY OF ARGUMENT

Amici urge the Court to hold that Subtitle A of Title II (hereinafter "Title II"),[2] considered as a whole, constitutes a proper exercise of Congress' authority under § 5 of the Fourteenth Amendment and therefore validly abrogates the sovereign immunity of the States under the Eleventh Amendment. While *Amici* agree with Petitioners that, as applied to prisons in particular, Subtitle A is a valid exercise of congressional authority, *Amici* respectfully submit that the proper deference to Congress counsels in favor of holding that Title II as a whole is valid § 5 legislation.

This Court has established a two-part test for evaluating congressional legislation under § 5: (1) Congress must have compiled a substantial record of unconstitutional state action; and (2) the legislative remedy must be a congruent and proportional response. *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 735, 737 (2003). In this case – unlike *City of Boerne v. Flores*, 521 U.S. 507 (1997), or *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001) – this Court has already determined that the first prong of this test has been met. *See Tenn. v. Lane*, 541 U.S. 509, 528 (2004) (referring to the "sheer volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities in the provision of public services," justifying "Congress' exercise of its prophylactic power" in enacting Title II). Congress documented exactly the types of conduct against people with disabilities based on fears and stereotypes that this Court held unconstitutional in *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985). In addition, Congress identified numerous violations by States of the fundamental constitutional rights of people with disabilities. *Lane*, 541 U.S. at 524. The only

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[2] As did this Court in *Tennessee v. Lane*, 541 U.S. 509, 517 (2004), *Amici* refer to Subtitle A of Title II simply as "Title II." Subtitle A contains all of Title II's generally applicable requirements. Subtitle B of Title II, in contrast, provides specific requirements for public transportation services. 42 U.S.C. §§ 12141-12165. This Court need not consider Subtitle B or public transportation at this time, as this case is governed solely by Subtitle A.

remaining question, therefore, is whether the Title II remedy falls within Congress' broad discretion for addressing this *proven* record of unconstitutional state conduct. *Amici* submit that the answer is yes.

As this Court has emphasized, Congress' conclusions about "whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment" are "entitled to much deference." *Boerne*, 521 U.S. at 536; *see also Saenz v. Roe*, 526 U.S. 489, 508 (1999) (Congress' authority under § 5 is a "broad power indeed") (citation omitted). Given the extensive record of unconstitutional discrimination and violations of the fundamental rights of individuals with disabilities identified in *Lane*, there can be no doubt that Congress had the authority to enact a broad ban on discrimination against people with disabilities by public entities.

Congress carefully devised Title II to be a congruent and proportional response. Title II prohibits public entities from discriminating against "qualified" persons with disabilities in the provision or operation of public services, programs, or activities. 42 U.S.C. § 12132. A "qualified" individual with a disability is someone who, "with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or participation in programs or activities provided by a public entity." *Id.* § 12131(2). Title II and its implementing regulations provide public entities wide flexibility in deciding how to comply with the statute's requirements. Drawing on its extensive experience under the Rehabilitation Act of 1973, 29 U.S.C. § 701, *et seq.*, Congress expressly mandated that the implementing regulations for Title II be consistent with the regulations issued under the Rehabilitation Act. *See* 42 U.S.C. § 12134. In accordance with Congress' design, the Title II regulations do not require public entities to do anything that would "fundamental[ly] alter[]" the nature of a service, program, or activity, 28 C.F.R. §§ 35.150(a)(3), 35.164, or that would pose an "undue" burden. *Id.* § 35.150(a)(3).

Because Title II does not require fundamental alterations or impose undue burdens, and because it gives States the ability to meet its requirements in a variety of ways, it targets precisely the conduct of public entities that is most likely to be unconstitutional. Congress could properly conclude that, where a governmental entity persists in excluding individuals with disabilities even though including them would be "reasonable," would not pose an "undue . . . burden[]," and would not require any "fundamental alteration" to the policy or program at issue, it is unlikely that there is a legitimate justification for doing so. At a minimum, Congress could reasonably conclude that, in such circumstances, further inquiry into the State's purported justifications was not likely to be cost-effective and would create an unacceptable risk that unconstitutional conduct would escape detection. Particularly in light of the extensive and disturbing record of unconstitutional discrimination by public entities that Congress had before it, Congress could legitimately be concerned that, in the absence of a prophylactic rule, public entities might attempt to hide discriminatory motives behind the pretense of fabricated or incidental reasons for their decisions. Put simply, nothing in the Constitution or this Court's case law requires Congress to accept a substantial risk that the guarantees of the Fourteenth Amendment will, as a practical matter, be under-enforced. On the contrary, § 5 was included in the amendment precisely to ensure that Congress would have the power to adopt appropriate measures to ensure full and effective enforcement of constitutional rights. *See Lane*, 541 U.S. at 518 ("Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct.").

Undeniably – and quite advertently – Title II thus sweeps in some situations where public entities would have constitutionally permissible justifications for their exclusionary practices. But it sweeps no more broadly than this Court permitted in *Hibbs*, and it does so for the same reason: in preventing unconstitutional discrimination, "Congress 'is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment,' but may prohibit 'a somewhat broader swath of

conduct'" in order to eliminate otherwise undeterred or undetected misconduct. *Hibbs*, 538 U.S. at 737 (quoting *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000)).

Because Title II forbids only government behavior that is *particularly likely* to be irrational or prejudicial and does so without imposing "undue . . . burdens," Title II is a proportional and congruent response to the record of unconstitutional discrimination Congress faced. That Title II also responds to the extensive record before Congress of violations of fundamental rights justifies particularly strong deference to Congress' judgments about the necessity of Title II's reach. *See Hibbs*, 538 U.S. at 737-40; *Lane*, 541 U.S. at 529. Such deference should entail allowing Congress to legislate in the manner it sees fit – here, to enact a general solution to address constitutional violations that had been documented across a broad range of public programs and services. This Court should respect Congress' judgment by holding that its chosen remedy is, as whole, a valid exercise of Congress' § 5 authority, rather than separately scrutinizing each particular application of the legislation.

ARGUMENT

I. Section 5 Of The Fourteenth Amendment Grants Congress "Broad Power" To Enact Prophylactic Legislation To Prevent And Deter Unconstitutional Conduct.

This Court has repeatedly acknowledged that Congress' explicit power under § 5 of the Fourteenth Amendment to enact "appropriate legislation" to "enforce" the substantive guarantees of that Amendment is a "'broad power indeed.'" *Lane*, 541 U.S. at 518 (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 732 (1982)); *Saenz v. Roe*, 526 U.S. 489, 508 (1999). As this Court explained scarcely a dozen years after the Fourteenth Amendment was adopted, § 5 by its plain terms grants to Congress the power to select the means that in its view are best adapted to enforcing the

guarantees of the amendment, so long as those means are "appropriate":

> Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

Ex parte Virginia, 100 U.S. 339, 345-46 (1880) (quoted approvingly in *Lane*, 541 U.S. at 518 n.3); *see also Boerne*, 521 U.S. at 517-18.

Moreover, the range of "appropriate" remedies from which Congress may choose is not limited to those laws that "simply proscribe conduct that [this Court] ha[s] held unconstitutional." *Hibbs*, 538 U.S. at 727. "Congress is not limited to mere legislative repetition of this Court's constitutional jurisprudence." *Garrett*, 531 U.S. at 365. Rather, Congress' § 5 power encompasses "'the authority both to remedy and to deter violation of rights guaranteed [by the Fourteenth Amendment] by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text.'" *Lane*, 541 U.S. at 518 (quoting *Kimel*, 528 U.S. at 81). This Court has "repeatedly affirmed that 'Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct.'" *Id.* (quoting *Hibbs*, 538 U.S. at 727-28); *see also Boerne*, 521 U.S. at 518 ("Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into legislative spheres of autonomy previously reserved to the States.") (internal quotation omitted).

Accordingly, this Court has consistently stated that Congress has "a *wide berth* in devising appropriate remedial and preventative measures for unconstitutional actions." *Lane*, 541 U.S. at 520

(emphasis added). This judicial deference to congressional judgments under § 5 not only properly respects the Fourteenth Amendment's allocation of authority between the national legislature and the courts but also reflects Congress' greater institutional competence in making practical judgments about the prophylactic measures necessary to remedy and prevent violations of individuals' constitutional rights. As this Court has emphasized in a variety of contexts, "[w]e owe Congress' findings deference in part because the institution is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions." *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) (internal quotations omitted). To assess the ways in which individuals' rights have been violated in various settings across the country, and what needs to be done to prevent such violations, Congress can draw upon its unique ability "to amass the stuff of actual experience and cull conclusions from it." *United States v. Gainey*, 380 U.S. 63, 66-67 (1965).

Congress' power to enact prophylactic measures under § 5 is not unlimited, however; it is subject to two significant constraints. First, Congress may act only in response to a record of constitutional violations "weighty enough to justify the enactment of prophylactic § 5 legislation." *Hibbs*, 538 U.S. at 735; *see also Lane*, 541 U.S. at 522-29 (examining the record of discrimination and violations of fundamental rights in the provision of public services and access to public facilities and concluding that these were "an appropriate subject for prophylactic legislation"); *Garrett*, 531 U.S. at 368 ("Congress' § 5 authority is appropriately exercised only in response to state transgressions.").

Second, § 5 legislation must be "'congruent and proportional to the targeted violation[s].'" *Hibbs*, 538 U.S. at 737 (quoting *Garrett*, 531 U.S. at 374). This Court has reasoned that, in the absence of such a limitation, Congress' power to adopt prophylactic measures could, in practice, effectively permit Congress to "substantive[ly] redefin[e]" the scope of the protections afforded by § 1 of the Fourteenth Amendment. *Lane*, 541 U.S. at 520; *Boerne*, 521 U.S. at 519-20. Conversely, a failure to give appropriate deference to Congress' judgments threatens to eliminate its § 5

power and to relegate Congress to "mere legislative repetition of this Court's constitutional jurisprudence." *Garrett*, 531 U.S. at 365. Precisely for that reason, in applying the congruence and proportionality test, the Court has "recognized that the line between remedial legislation and substantive redefinition is 'not easy to discern,'" and has emphasized that "'Congress must have *wide latitude* in determining where it lies.'" *Lane*, 541 U.S. at 520 (emphasis added) (quoting *Boerne*, 521 U.S. at 519-20). "It is for Congress in the first instance to 'determine *whether* and *what* legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference." *Boerne*, 521 U.S. at 536 (emphasis added) (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966)).

As set forth below, both of these requirements are satisfied with respect to Title II as a whole.

II. As This Court Already Determined In *Lane*, Title II Satisfies The First Requirement For § 5 Legislation Because It Responds To A Record Of Widespread Constitutional Violations By Public Entities.

In *Lane*, this Court held that "the extensive record of disability discrimination" before Congress when it adopted Title II "ma[de] clear beyond peradventure that inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation." 541 U.S. at 529. As the lower court has itself recognized, this holding establishes, without more, that the first requirement of *Boerne*'s test is satisfied, and that the only question is whether Title II is congruent and proportional to the targeted violations. *See Miller v. King*, 384 F.3d 1248, 1272 (11th Cir. 2004) ("[T]he Supreme Court . . . concluded that Title II in its entirety satisfies *Boerne*'s . . . requirement that it be enacted in response to a history and pattern of States' constitutional violations. We are bound by that conclusion.").

To the extent that a further review of the record before Congress is necessary, it clearly confirms *Lane*'s holding on this score. As this Court explained, "Congress enacted Title II against a backdrop of

pervasive unequal treatment [of people with disabilities] in the administration of state services and programs, including systematic deprivations of fundamental rights," and this "pattern of disability discrimination persisted despite several federal and state legislative efforts to address it." 541 U.S. at 524, 526 (emphasis added). This pattern of pervasive disability discrimination was amply illustrated by the following examples noted by the Court:

> [A]s of 1979, most States . . . categorically disqualified "idiots" from voting, without regard to individual capacity. The majority of these laws remain on the books, and have been the subject of legal challenge as recently as 2001. Similarly, a number of States have prohibited and continue to prohibit persons with disabilities from engaging in activities such as marrying and serving as jurors. The historical experience that Title II reflects is also documented in this Court's cases, which have identified unconstitutional treatment of disabled persons by state agencies in a variety of settings, including unjustified commitment, the abuse and neglect of persons committed to state mental health hospitals, and irrational discrimination in zoning decisions. The decisions of other courts, too, document a pattern of unequal treatment in the administration of a wide range of public services, programs, and activities, including the penal system, public education, and voting. Notably, these decisions also demonstrate a pattern of unconstitutional treatment in the administration of justice.

Id. at 524-25 (footnotes and internal quotations omitted).

Indeed, as set forth below, the voluminous record before Congress[3] amply "demonstrat[ed] the nature and extent of

[3] Before enacting Title II, Congress held 13 committee hearings, 63 field hearings, and prolonged floor debate, all documenting this pattern of unequal treatment and deprivation of fundamental rights. S. Rep. No. 101-116, at 4-5, 8-9 (1989); H.R. Rep. No. 101-485, pt. 2, at 24-28, 31 (1990). Congress also considered several reports and surveys

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unconstitutional discrimination against persons with disabilities in the provision of public services," both in terms of irrational disability discrimination and in terms of violations of the fundamental rights of the disabled. *Id.* at 528.

A. Title II was enacted in response to an extensive record of irrational disability discrimination by public entities.

The Equal Protection clause prohibits governmental conduct that disfavors people with disabilities and that is irrational, arbitrary, or motivated by "mere negative attitudes" about people with disabilities or "vague, undifferentiated fears." *Cleburne*, 473 U.S. at 448-49, 474; *see also ia.* at 446-47 (holding that "legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose" and that "some objectives – such as a bare desire to harm a politically unpopular group – are not legitimate state interests") (internal quotation omitted); *Garrett*, 531 U.S. at 374 (Kennedy, J., concurring) ("Prejudice . . . rises not from malice or hostile animus alone. It may result as well from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves."); *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 83 (1988) ("Arbitrary and irrational discrimination violates the Equal Protection Clause under even our most deferential standard of review.").

Much of the evidence Congress collected prior to enacting Title II involved conduct by public officials that fell into one of these two categories. *See Garrett*, 531 U.S. at 369, 372 n.7 (noting that

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highlighting violations of the rights of individuals with disabilities. *See, e.g.*, Task Force on the Rights and Empowerment of Americans with Disabilities, U.S. Cong., House of Representatives, From ADA to Empowerment (1990); United States Comm'n on Civil Rights, Accommodating the Spectrum of Individual Abilities (1983).

Congress had support for its finding that "discrimination against individuals with disabilities continue[s] to be a serious and pervasive social problem," and that the "overwhelming majority" of the evidence of unconstitutional state disability discrimination pertained to the "provision of public services and public accommodations"). Indeed, "[i]n the deliberations that led up to the enactment of the ADA," Congress "uncovered . . . hundreds of examples of unequal treatment of persons with disabilities by States and their political subdivisions." *Lane*, 541 U.S. at 526.

For example, Congress heard an account of a veteran with a disability being forbidden to use a public pool and being told by the park commissioner, "it's not my fault you went to Vietnam and got crippled," 3 STAFF OF THE HOUSE COMM. ON EDUC. AND LABOR, 101st CONG., 2d Sess., LEGIS. HIST. OF Pub. L. No. 101-336: THE AMERICANS WITH DISABILITIES ACT 1872 ("LEGIS. HIST.") (Comm. Print 1990) (statement of Peter Addesso); of a zookeeper's refusing to admit children with Down Syndrome "because he feared they would upset the chimpanzees," S. REP. No. 101-116, at 7; *see also* H.R. REP. No. 101-485, pt. 2, at 30; and of a student with epilepsy being asked to leave a state college because her seizures were "disrupt[ive]." 2 LEGIS. HIST. 1162 (statement of Peter Addesso). Congress also heard of a court ruling that "a cerebral palsied child, who was not a physical threat and was academically competitive, should be excluded from public school, because his teacher claimed that his physical appearance 'produced a nauseating effect' on his classmates." H.R. REP. No. 101-485, pt. 2, at 30 (quoting 117 CONG. REC. 45,974 (1971)); *see also id.* at 29 (describing testimony about a student in a wheelchair being "refused admission because the principal ruled that [the student] was a fire hazard").

As recently as 1983, fifteen States had compulsory sterilization laws for various categories of persons with disabilities. *See* United States Comm'n on Civil Rights, *Accommodating the Spectrum of Individual Abilities*, 37 n.144 (1983) ("*Spectrum*"). Congress was also concerned "that discrimination has been a frequent and pervasive problem in institutional settings and . . . that segregating disabled persons from others can be discriminatory." *Olmstead v.*

L.C., 527 U.S. 581, 614 (1999) (Kennedy, J., concurring) (explaining that "[b]oth of those concerns are consistent with the normal definition of discrimination – differential treatment of similarly situated groups").

At the time Congress enacted the ADA, the U.S. Commission on Civil Rights had recently concluded that: "Despite some improvements . . . [discrimination] persists in such critical areas as education, employment, institutionalization, medical treatment, involuntary sterilization, architectural barriers, and transportation." S. REP. NO. 101-116, at 8. The Committee on Education and Labor found that "[D]iscrimination [against people with disabilities] often results from false presumptions, generalizations, misperceptions, patronizing attitudes, ignorance, irrational fears, and pernicious mythologies." *Id.* at 30. Congressman McDermott explained that the ADA was necessary because: "Every day, millions of disabled Americans face discrimination based solely on their disability, and have no recourse or remedy against those who are discriminating against them." 136 CONG. REC. H2,626 (daily ed. May 22, 1990) (statement of Rep. McDermott); *see also* 136 CONG. REC. H2447 (daily ed. May 17, 1990) (statement of Rep. Miller) ("If we continue to shut those with disabilities out, . . . if we continue to permit blatant discrimination[,] then we, as individuals, and as a society are the ones who must bear the consequences.").

Irrational disability discrimination in the administration of public services and programs poses a particular problem because it can lead to the permanent isolation and exclusion of individuals with disabilities. *See* 42 U.S.C. § 12101(a)(7) (stating the Congressional finding that "individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society"); *Lane*, 541 U.S. at 516 (quoting same). Whereas irrational disability discrimination in other areas, such as State employment, generally leaves open the possibility of pursuing similar opportunities or services in the private sector, there are often no alternatives or opt-out options available in the public programs and services regulated

under Title II. *See* S. REP. No. 101-116, at 12 ("[A]ccess to all public services is particularly critical in rural areas, because State and local government activities are frequently the major activities in such small towns. . . . [C]urrent law . . . does not protect people with disabilities in such areas from discrimination."). Exclusion from programs and services that allow people with disabilities to participate in the political process is particularly pernicious, since it prevents people with disabilities from shaping how the laws affect them. *See Kramer v. Union Free School Dist.*, 395 U.S. 621, 627 (1969) (describing "the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives").

B. Title II also responded to widespread violations of the fundamental constitutional rights of individuals with disabilities.

In addition to responding to the extensive record of unconstitutional disability discrimination, Title II was "aimed at the enforcement of a variety of basic rights." *Lane*, 541 U.S. at 529. These included the fundamental rights of access to courts, *see id.* at 527 ("Congress itself heard testimony from persons with disabilities who described the physical inaccessibility of local courthouses."), and voting. *See, e.g.*, S. REP. No. 101-116, at 12 (describing the inability of citizens with disabilities to "exercise one of [their] most basic rights as an American" because polling places or voting machines were inaccessible); *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (recognizing voting as "a fundamental political right, . . . preservative of all rights"). Congress had heard evidence of violations of the right of individuals with disabilities to procreate, *see supra* at 11 (discussing mandatory sterilization laws); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (holding that strict scrutiny governs sterilization classifications); and of their right to retain custody of their children. *See, e.g.*, H.R. REP. No. 101-485, pt. 2, at 41 ("[B]eing paralyzed has meant far more than being unable to walk – it has meant being . . . deemed an 'unfit parent'" in custody proceedings); *Stanley v. Illinois*, 405 U.S. 645 (1972) (recognizing the ability to retain custody of one's children as a fundamental right);

cf. In re Marriage of Carney, 24 Cal. 3d 725 (1979) (reversing trial court decision and awarding custody of minor children to parent with disability).

Congress had also been presented with evidence of unconstitutionally inhumane and abusive treatment of institutionalized individuals, and cruel and unusual punishment of prisoners with disabilities. *See, e.g.*, 132 CONG. REC. S5914-01 (daily ed. May 14, 1986) (statement of Sen. Kerry) ("The extent of neglect and abuse uncovered in [State-run mental health facilities] was beyond belief."); *Civil Rights of Institutionalized Persons: Hearings on S. 1393 Before the Subcomm. on the Const. of the Sen. Comm. on the Judiciary*, 95th Cong. 127 (1977) (statement of Michael D. McGuire, M.D.) ("the personnel regarded patients as animals . . . [and] group kickings and beatings were part of the program"); *Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982) (recognizing that involuntarily committed individuals have a substantive due process right to safe conditions); *Spectrum*, at 168 (listing, *inter alia*, the "[i]nadequate treatment and rehabilitation programs in penal and juvenile facilities[,] [i]nadequate ability to deal with physically handicapped accused persons and convicts (*e.g.*, accessible jail cells and toilet facilities) [and] [a]buse of handicapped persons by other inmates"); *Trop v. Dulles*, 356 U.S. 86, 101 n.32 (1958) (explaining that the Court "examines the particular punishment involved in light of the basic prohibition against inhuman treatment" to determine whether it is cruel and unusual). Judicial decisions in the years preceding the ADA's enactment further documented violations of disabled prisoners' rights. *See, e.g., Parrish v. Johnson*, 800 F.2d 600, 602-03 (6th Cir. 1986) (describing paraplegic inmates' being forced to sit in own feces, being denied requests for medical aid, and being given food placed in deliberately inaccessible positions); *La Faut v. Smith*, 834 F.2d 389, 394 (4th Cir. 1987) (describing a paraplegic inmate who was unable to access toilet facilities).

Congress designed Title II to prevent such fundamental rights violations and to better enable individuals with disabilities to participate in the central functions of their government and the services it provides. This Court has repeatedly recognized the profound

importance of giving every person access to government. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 633 (1996) ("Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance."); *McDonald v. Smith*, 472 U.S. 479 (1985) (upholding right to petition the government for redress of grievances); *Boddie v. Conn.*, 401 U.S. 371 (1971) (guaranteeing right to access the courts).[4]

III. Because It Is A Congruent And Proportional Response To The Widespread Constitutional Violations Congress Identified, Title II Satisfies The Second Requirement For § 5 Legislation.

The only remaining question is whether Title II is "congruent and proportional to the targeted violation[s]." *Garrett*, 531 U.S. at 374. Especially in light of the deference due to Congress' choice of means, *see supra* at 7, the answer to that question must be yes.

As an initial matter, the fact that Title II reaches all public programs and services[5] does *not* mean that it is not "congruent and proportional." On the contrary, because "the appropriateness of remedial measures must be considered in light of the evil presented," *Boerne*, 521 U.S. at 530, the broad sweep of Title II is warranted

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[4] That Title II responded to an extensive record of constitutional violations entirely distinguishes it from the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb, *et seq.*, which this Court invalidated in *City of Boerne v. Flores*, 521 U.S. 507 (1997). Although the RFRA also targeted a fundamental right, that of free exercise of religion, this Court found in *Boerne* that Congress had failed to make any showing prior to enacting the RFRA that people's free exercise rights were being violated by the States. *See id.* at 530 ("RFRA's legislative record lack[ed] examples of modern instances of generally applicable laws passed because of religious bigotry").

[5] Public transportation is the one exception. *See supra* note 2; *see also* 28 C.F.R. § 35.102(b) ("To the extent that public transportation services, programs, and activities of public entities are covered by subtitle B of title II of the ADA, they are not subject to the requirements of [the regulations implementing subtitle A].").

in light of the "wide range of public services, programs, and activities" that had exhibited "pervasive" patterns of unconstitutional discrimination. *Lane*, 541 U.S. at 525-26. Moreover, "'[d]ifficult and intractable problems often require powerful remedies,'" *id.* at 524 (quoting *Kimel*, 528 U.S. at 88), and the problems Title II was designed to address were – and are – difficult and intractable: "Th[e] pattern of disability discrimination [had] persisted despite several federal and state legislative efforts to address it. In the deliberations that led up to the enactment of the ADA, Congress identified important shortcomings in existing laws that rendered them 'inadequate.'" *Id.* at 526 (quoting S. REP. No. 101-116, at 18). Faced with the severe, persistent problem of unconstitutional treatment of individuals with disabilities across a wide range of governmental functions and services, Congress had reason to enact a remedy that comprehensively addressed the full scope of that problem.

Although the *range* of programs reached by Title II is comprehensive, the "remedy Congress chose is nevertheless a limited one." *Id.* at 531-32. Thus, for example, Title II "requires only 'reasonable modifications' that would not fundamentally alter the nature of the service provided, and only when the individual seeking modification is otherwise eligible for the service." *Id.* at 531-32 (quoting 42 U.S.C. § 12131(2)). As explained below, a careful examination of the flexibility and defenses built into the statute and its implementing regulations makes clear that Title II, considered as a whole, is a proportional and congruent response to the problems Congress had documented.

A. Title II gives public entities substantial flexibility and does not pose undue burdens.

The requirements imposed by Title II and its implementing regulations fall into four basic categories: (1) program accessibility, (2) policy modifications, (3) effective communications, and (4) new construction and alterations. These requirements apply to all governmental services other than public transportation, but each has significant limitations.

1. Program accessibility.

Title II states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. The Department of Justice's implementing regulations explain that this requires public entities to "operate each service, program, or activity so that the service, program, or activity, *when viewed in its entirety*, is readily accessible to and usable by individuals with disabilities." 28 C.F.R. § 35.150(a) (emphasis added).[6] The regulations also specifically provide that this "does not . . . [n]ecessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities," nor does it "[r]equire a public entity to take any action that would threaten or destroy the historic significance of an historic property." *Id.* § 35.150(a)(1), (2). In order to allow public entities to preserve the essential characteristics of their programs and services, the regulations do not require actions that "would result in a fundamental

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[6] Although many of the key limitations on Title II's requirements appear in the implementing regulations, it is appropriate to consider those limitations in evaluating Title II's proportionality and congruence. Congress specifically stated in Title II that the regulations implementing Title II should be consistent with the regulations implementing the Rehabilitation Act. *See* 42 U.S.C. § 12134. The section of the Title II regulations containing the "fundamental alteration" and "undue burden" limitations was "taken from the [Rehabilitation Act] regulations for federally conducted programs, [and] generally codifies case law that defines the scope of the public entity's obligation to ensure program accessibility." 56 Fed. Reg. 35694, 35709 (July 26, 1991); *see also* 45 C.F.R. § 84.11(a) (providing that an accommodation is not reasonable under the Rehabilitation Act if it poses an "undue" hardship); *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 288 n.17 (1987) ("Accommodation is not reasonable [under the Rehabilitation Act regulations] if it either imposes undue financial and administrative burdens on a grantee, or requires a fundamental alteration in the nature of the program") (internal quotations omitted); *see also Lane*, 541 U.S. at 531-32 (considering Title II's implementing regulations in determining that "the remedy Congress chose [in Title II] is . . . a limited one").

alteration in the nature of a service, program, or activity." Nor must public entities incur "undue financial and administrative burdens." *Id.* § 35.150(a)(3); *Olmstead*, 527 U.S. at 604 (plurality opinion) (interpreting the fundamental alteration limitation to "allow the State to show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken" with regard to the program or service as a whole).

The regulations are very flexible, allowing public entities many compliance options. *See, e.g.*, 28 C.F.R. § 35.150(b) (listing numerous methods of providing program access); *Lane*, 541 U.S. at 532 ("As Title II's implementing regulations make clear, the reasonable modification requirement can be satisfied in a number of ways."). The Department of Justice has provided guidance reinforcing that governmental entities may achieve this overall program accessibility objective through a wide variety of means. *See, e.g.*, http://www.usdoj.gov/crt/foia/tal713.txt (Sept. 17, 1996) (inquiry regarding tornado warnings for people with hearing impairments: "suggestion of a flashing light that is activated when a tornado siren is activated is one possible means of ensuring effective communication of tornado warnings to individuals with hearing impairments. Other options may also be available. The ADA does not dictate use of any particular method of complying with title II's effective communication requirement, as long as the method chosen ensures effective communication with persons with disabilities."); http://www.usdoj.gov/crt/foia/lofc021.txt (Sept. 10, 1993) (allowing States with inaccessible polling places to provide access to voters with mobility impairments by having polling place managers take the voting list and the voter's ballot to the voter in his or her vehicle).

2. Policy modifications.

Title II's implementing regulations also require public entities to "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making

the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7). As the text of this provision makes clear, it is aimed specifically at preventing policies that discriminate on the basis of disability. But even discriminatory policies need not be changed if the modifications would fundamentally alter the service, program, or activity, or if the modification would otherwise be unreasonable. *Id.*

Often, the modifications are cost free. The Justice Department's Technical Assistance Manual provides an illustration of such a situation:

> ILLUSTRATION 3: A county ordinance prohibits the use of golf carts on public highways. An individual with a mobility impairment uses a golf cart as a mobility device. Allowing use of the golf cart as a mobility device on the shoulders of public highways where pedestrians are permitted, in limited circumstances that do not involve a significant risk to the health or safety of others, is a reasonable modification of the county policy.

Department of Justice, Americans with Disabilities Act Technical Assistance Manual Covering State and Local Government Programs and Services, http://www.usdoj.gov/crt/ada/taman2.html#II-3.6100 (modified Oct. 27, 2004). Moreover, public entities need not fundamentally alter their programs. *See, e.g.*, http://www.usdoj.gov/crt/foia/tal816.htm (May 30, 2000) (in case involving requested modification of flood ordinance, Department wrote, "While Title II and the Fair Housing Act require reasonable modification of zoning ordinances and procedures, they do not provide a broad exemption from zoning requirements for individuals with disabilities.").

3. Effective communications.

Title II's implementing regulations further provide that "[a] public entity shall take appropriate steps to ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communications with others." 28 C.F.R. § 35.160(a). That obligation is limited, however, in that it

does not require public entities to do anything that "would result in a fundamental alteration in the nature of a service, program, or activity" or that would pose "undue financial and administrative burdens." *Id.* § 35.164.

4. New construction and alterations.

Title II's implementing regulations also require that facilities or parts of facilities "constructed by, on behalf of, or for the use of a public entity shall be designed and constructed in such manner that [they are] . . . readily accessible to and usable by individuals with disabilities." *Id.* § 35.151(a). When a public entity alters a facility or part of a facility "in a manner that affects or could affect [its] usability," "to the maximum extent feasible," its alterations must be done such "that the altered portion of the facility is readily accessible to and usable by individuals with disabilities." *Id.* § 35.151(b). The Congressional Budget Office's cost estimate report for the ADA stated that "[a]ccording to a study conducted by the Department of Housing and Urban Development in 1978, the cost of making a building accessible to the handicapped is less than one percent of total construction costs if the accessibility features are included in the original building design." H.R. REP. NO. 101-485, pt. 1, at 49; *see also* H.R. REP. NO. 101-485, pt. 2, at 36 ("Several witnesses also recognized that newly constructed build-ups should be fully accessible because the additional costs for making new facilities accessible are often nonexistent or negligible.").[7]

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[7] Again, the Justice Department's technical assistance letters indicate the limitations on Title II's requirements. *See, e.g.*, http://www.usdoj.gov/crt/foia/tal806.htm (Nov. 16, 1999) (state not required to build special paths across levee for people with disabilities); http://www.usdoj.gov/crt/foia/tal785.htm (Dec. 14, 1998) (inquiry whether elevator must be added if one-floor post office expanded: "if space is being added to an existing floor level without affecting the circulation path between the basement and the ground floor, then it is unlikely that title II would require an elevator so long as the added space is, to the maximum extent feasible, readily accessible"); http://www.usdoj.gov/crt/foia/tal720.txt (Dec. 13, 1996) (inquiry whether ADA requires

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B. The limitations and defenses built into Title II and its implementing regulations make Title II's requirements appropriately tailored prophylactic measures.

By exempting modifications and accommodations that are unreasonable, impose "undue" burdens, or necessitate "fundamental alterations," Congress has focused Title II on those instances in which, even though the governmental entity could make "reasonable" modifications without "undue" expense, it nonetheless persists in refusing to do so and thereby excludes individuals with disabilities from government services and programs that other citizens enjoy. Congress was justified in concluding that such instances are sufficiently likely to involve unconstitutional discrimination that any further effort to determine whether the public entity's purported justifications are valid and legitimate, or merely pretextual, is simply not worth the cost and would create an unacceptable risk that, in practice, the guarantees of the Fourteenth Amendment would be under-enforced. It is inherent in the nature of a "prophylactic" rule that, at some point, further case-specific inquiry is deemed not to be cost-effective. *Cf. Coleman v. Thompson*, 501 U.S. 722, 737 (1991) ("'Cases that do not fit the generalization may arise, but a per se rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them.'") (quoting *Continental T. V. v. GTE Sylvania*, 433 U.S. 36, 50 n.16 (1977)). Indeed, in affirming Congress' power to enact such rules under § 5, this Court has expressly recognized that Congress is entitled to adopt rules that are fully sufficient to prevent "subtle discrimination that may be difficult to detect on a case-by-case basis." *Hibbs*, 538 U.S. at 736; *see also Boerne*, 521 U.S. at 525-26 (in adopting prophylactic rules under § 5, Congress may properly consider the "costly character of case-by-case litigation")

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pedestrian walkways at highway construction sites: "the ADA does not require installation of pedestrian walkways in new construction projects where no such walkways are planned").

(citing *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966)). Here, Congress chose to permit States to attempt to justify their discrimination against the disabled on the grounds that including them in the State's programs and services would impose "undue" burdens or would require "fundamental alterations." Having done so, Congress could legitimately conclude that the costs of further case-specific inquiry into the State's motives or justifications would be paid in the form of unremedied or undetected constitutional violations. Particularly in light of the "sheer volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities in the provision of public services," *Lane*, 541 U.S. at 528, that was a choice § 5 permits Congress to make.

For example, consider a situation in which a city council historically held hearings on the second floor of a building without elevators, and the council refused to move to an accessible first floor room to allow citizens in wheelchairs to attend. Congress was justified in enacting broad prophylactic rules that essentially assumed that such situations are so likely to involve unconstitutional discrimination, or to create an unacceptable risk of undetected constitutional violations, that further inquiry into the council's purported "justifications" for such conduct would not be worth the cost. *See Hunter v. Underwood*, 471 U.S. 222, 228 (1985) ("Proving the motivation behind official action is often a problematic undertaking.").

Expanding governmental services to people with disabilities is also prophylactic, because including those people in governmental programs and services and decreasing their isolation reduces stereotypes about them. *Cf. Hibbs*, 538 U.S. at 736 (explaining that the FMLA targets "[s]tereotypes about women's domestic roles [that] are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. . . . Those perceptions, in turn, Congress reasoned, lead to subtle discrimination that may be difficult to detect on a case-by-case basis."). Ensuring that people with disabilities are not excluded from the political process also increases their ability to shape events that affect them, thereby diminishing the possibility of unconstitutional discrimination.

Because Title II forbids government behavior that is itself unconstitutionally discriminatory or that is difficult or costly to distinguish from conduct that is, Title II is a proportional and congruent response to the record of unconstitutional disability discrimination Congress faced. *Lane*, 541 U.S. at 518 ("'Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct.'") (quoting *Hibbs*, 538 U.S. at 727-28).

C. Title II's discrimination prevention measures are clearly within the bounds of what *Lane* specifically allows.

This Court explained in *Lane* that "[w]hen Congress seeks to remedy or prevent unconstitutional discrimination, § 5 authorizes it to enact prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent, to carry out the basic objectives of the Equal Protection Clause." *Id.* at 520. In other words, Congress may proscribe practices that are not unconstitutional, but which merely cause a disparate impact. *See id.* at 519 (explaining that the Court in *Hibbs* upheld the FMLA as a valid exercise of Congress' § 5 power to combat unconstitutional sex discrimination, "even though there was no suggestion that the State's leave policy was adopted or applied with a discriminatory purpose that would render it unconstitutional under the rule of *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979)").

Title II goes no further than to "proscrib[e] practices that are discriminatory in effect, if not in intent." *Lane*, 541 U.S. at 520. Indeed, what Title II requires is much more limited. Title II requires certain modifications in public services, programs, and activities, when, absent those modifications, the services, programs, and activities would exclude participants with disabilities – *i.e.*, when the services, programs, and activities otherwise would be discriminatory in effect. 42 U.S.C. § 12132. But Title II does not forbid even all practices that are discriminatory in effect. As described above, it requires only "reasonable" modifications, *id.* § 12131(2),

and exempts modifications that would pose an undue burden or fundamentally alter the nature of a service, program, or activity. 28 C.F.R. §§ 35.150(a), 35.164.

Lane's holding that Congress may enact prophylactic legislation proscribing practices that are discriminatory in effect but not necessarily intent does not undermine this Court's decision in *Garrett*. *Lane* said only that "§ 5 authorizes [Congress] to enact prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent," "[*w*]*hen Congress seeks to remedy or prevent unconstitutional discrimination*," or, in other words, when the first requirement for § 5 legislation is met. 541 U.S. at 520 (emphasis added). This Court held in *Garrett* that the record "fail[ed] to show that Congress [had] . . . identif[ied] a pattern of irrational state discrimination in employment against the disabled" before enacting Title I of the ADA. 531 U.S. 356, 368 (2001). This Court therefore did not decide in *Garrett* whether the requirements of Title I would have constituted a proportional and congruent response to an extensive record of unconstitutional discrimination against individuals with disabilities in the employment context.[8]

D. Title II also prevents and remedies violations of fundamental rights, further demonstrating that it is a proportional and congruent response to the record of constitutional violations before Congress.

By requiring public entities to operate services, programs, and activities in a manner accessible to people with disabilities, and by prohibiting public entities from adopting discriminatory policies, Title II also prevents the sorts of violations of the fundamental rights of individuals with disabilities that Congress catalogued prior to enacting the ADA. For example, Title II prohibits policies mandating sterilization or denying child custody to parents with disabilities, because such policies discriminate on the basis of disability.

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[8] This Court has also noted that a State's "interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer." *Waters v. Churchill*, 511 U.S. 661, 675 (1994).

42 U.S.C. § 12132; 28 C.F.R. § 35.130(b)(7). By requiring prisons to provide restroom facilities accessible to prisoners with disabilities, Title II prevents prisoners with disabilities from being subjected to the cruel and unusual punishment of being forced to sit in their own feces or to fall and break limbs while attempting to reach a toilet. 42 U.S.C. § 12132; 28 C.F.R. § 35.150. Title II also protects a variety of due process rights by requiring courthouse accessibility. *See Lane*, 541 U.S. at 527; *id.* at 533 ("Title II's affirmative obligation to accommodate persons with disabilities in the administration of justice cannot be said to be 'so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.'") (quoting *Boerne*, 521 U.S. at 532). Similarly, it protects voting rights by requiring polling place accessibility. 42 U.S.C. § 12132. That Title II responds to the extensive record before Congress of violations of individuals with disabilities' fundamental rights by preventing and remedying future violations of those rights further confirms that Title II is proportional and congruent to Congress' "remedial . . . object." *Lane*, 541 U.S. at 533.

IV. Congress' Legislative Judgments Deserve Particularly Strong Deference When, As Here, Congress Is Protecting Fundamental Rights Pursuant To § 5 Of The Fourteenth Amendment.

Because Title II is a proportional and congruent response to the vast record of constitutional violations before Congress, and because Title II is completely within the bounds of what *Lane* declared appropriate, Title II should be found to be valid § 5 legislation under the normal, appropriately deferential standards applied by this Court in evaluating *any* legislative choices made by Congress under its § 5 powers. Because Title II, in many of its applications, is aimed at remedying and deterring violations of *fundamental* rights, however, the congressional judgments underlying Title II should be given special deference, and any doubts should therefore be resolved in favor of Title II's constitutionality.

A. Congress' § 5 power is particularly broad and its legislative judgments are entitled to especially strong deference when it is responding to violations of fundamental rights.

As this Court has explained, Congress' conclusions about "whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment" always "are entitled to much deference." *Boerne*, 521 U.S. at 536; *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966). Congress' conclusions are entitled to even more deference when the legislation at issue protects fundamental rights or suspect classes. This Court has explicitly held that "'it [i]s easier for Congress to show a pattern of state constitutional violations'" to justify the need for § 5 legislation when Congress is addressing rights or classifications that trigger a heightened standard of judicial scrutiny than when Congress is targeting "classifications subject to rational-basis review." *Lane*, 541 U.S. at 529 (quoting *Hibbs*, 538 U.S. at 735-37). Likewise, because "the appropriateness of remedial measures must be considered in light of the evil presented," *Boerne*, 521 U.S. at 530, when Congress is legislating to protect fundamental rights or suspect classes, it should be easier for Congress to demonstrate that the remedial measures it has chosen are appropriate. Because Title II protects a variety of fundamental rights, *see supra* at 13-15, Congress' decisions about Title II's content are entitled to such deference, even though disability is itself not a suspect classification. *See Cleburne*, 473 U.S. at 446-47.[9]

Hibbs applied exactly such expanded deference. There, this Court deferred to Congress' judgments about the appropriateness

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[9] That Title II responds to violations of fundamental rights further distinguishes it from Title I of the ADA, at issue in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001). Because there is no fundamental right to government employment, *see Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976), there was no fundamental right at stake in *Garrett*. In contrast, this Court has held that the record that motivated Congress to enact Title II contained widespread violations of individuals with disabilities' fundamental constitutional rights. *Lane*, 541 U.S. at 522-29.

of the remedial measures in the Family and Medical Leave Act ("FMLA"). *Hibbs*, 538 U.S. at 737-40. The evidence Congress had heard of gender-based unequal treatment prior to enacting the FMLA was composed only of examples of employers' (mostly private, not state) providing more expansive maternity than paternity leave. *Id.* at 730-32. The remedy Congress chose to address this differential treatment was not just to prohibit gender-based differentiation in parental leave policies, or even in all leave policies, but instead to require nearly all employers to give workers up to 12 weeks of unpaid leave annually "for any of several reasons, including the onset of a serious health condition in an employee's spouse, child, or parent." *Id.* at 724 (internal quotation omitted). In response to the dissenting Justices' suggestion that the appropriate remedy would have been simply to proscribe discrimination in the provision of any leave policies instead of creating what is essentially a new entitlement, the Court explained that "this position cannot be squared with our recognition that Congress 'is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment.'" *Id.* at 737 (quoting *Kimel*, 528 U.S. at 81).

As *Hibbs* and *Lane* make clear, when fundamental rights or suspect classifications are at issue, Congress has a particularly "wide berth in devising appropriate remedial and preventative measures for unconstitutional actions." *Lane*, 541 U.S. at 520. Congress thus had particularly broad authority to draw upon when it enacted Title II.

B. Especially when Congress is acting under § 5 to respond to violations of fundamental rights, Congress should have discretion in how it drafts legislation.

This Court has emphasized that Congress' enactments are entitled to a "presumption of constitutionality." *United States v. Morrison*, 529 U.S. 598, 607 (2000). This is at least in part because of the respect due by courts to "a coordinate branch of Government." *Id.* Respecting Congress as a coordinate branch of government also entails allowing Congress to approach the drafting of legislation in

the manner it sees fit. *Cf. Boerne*, 521 U.S. at 531-32 (noting that "[a]s a general matter, it is for Congress to determine the method by which it will reach a decision"). For instance, when addressing a problem that manifests itself in a variety of contexts, Congress should be able to enact generally applicable standards to apply to all of those contexts. Congress should not be forced to legislate bit by bit, addressing one narrow context at a time.

Congress enacted Title II to "reach[] a wide array of official conduct in an effort to enforce an equally wide array of constitutional guarantees." *Lane*, 541 U.S. at 530. Congress should be entitled to do so, without writing a separate statute for each constitutional guarantee and each area of official conduct – particularly when responding to violations of fundamental rights. To insist that Congress draft separate provisions to address each sub-context in which the rights of individuals with disabilities are violated, with a separate evidentiary record to support each, would be inconsistent with courts' respect for Congress as a coequal branch of the government. It would force Congress to act like an administrative agency, writing detailed regulations instead of statutes that embody national policy principles. This Court therefore should review Title II in its entirety and declare it a valid exercise of Congress' § 5 authority.

CONCLUSION

For the reasons set forth above, and consistent with their commitment to protecting the constitutional rights of individuals with disabilities, *Amici* respectfully submit that the Court should hold that Title II as a whole was validly enacted pursuant to Congress' power under § 5 of the Fourteenth Amendment.

Respectfully submitted,

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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

STATE OF GEORGIA, ET AL.,

Respondents.

TONY GOODMAN,

Petitioner,

v.

STATE OF GEORGIA, ET AL.,

Respondents.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

Question Presented in No. 04-1203

Whether Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131 to 12165, is a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment, as applied to the administration of prison systems.

Question Presented in No. 04-1236

Whether, and to what extent, Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 *et seq.*, validly abrogates state sovereign immunity for suits by prisoners with disabilities challenging discrimination by state-operated prisons, a question on which the courts of appeals are in conflict.

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INTEREST OF THE AMICUS CURIAE[1]

With more than 400,000 members, the American Bar Association ("ABA") is the nation's leading organization of the legal profession. The ABA's primary mission is to "serve the public and the [legal] profession by promoting justice, professional excellence and respect for the law."[2] In furtherance of this mission, the ABA's goals include "promoting improvements in the American system of justice"[3] and "increas[ing] public understanding of and respect for the law, the legal process and the role of the legal profession."[4]

The ABA's interest in this matter is based upon its longstanding commitment to the protection of persons with disabilities from discrimination. Since 1976, the ABA has published the most comprehensive periodical available on disability law, now known as the Mental and Physical Disability Law Reporter.[5] In 1989, prior to the enactment of

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[1] This brief has not been authored in whole or in part by counsel for a party, and no person or entity, other than the American Bar Association, its members, and its counsel, has made a monetary contribution to the preparation or submission of this brief. Petitioners and respondents have consented to the filing of this brief.

Neither this brief, nor the decision to file it, should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

[2] American Bar Association, *ABA Policy and Procedures Handbook* 1 (2005).

[3] ABA Goal I, *id.* at 2.

[4] ABA Goal IV, *id.*

[5] The Mental and Physical Disability Law Reporter publishes a number of articles each year outlining case law developments relating to the treatment of disabled prisoners and the conditions of their confine-

the Americans with Disabilities Act of 1990 (the "ADA"), the ABA House of Delegates resolved to support "federal legislation which prohibits discrimination on the basis of disabilities."[6] Recognizing that persons with disabilities were being systematically excluded from meaningful participation in society, the ABA recommended legislation that would "ensure equal opportunities for [the more than 43 million Americans] with disabilities in employment, public accommodations and services . . . and activities of State and local governments."[7]

In 2002, the ABA reaffirmed its dedication to protecting the rights of persons with disabilities by adopting a resolution urging courts to "ensure [persons with disabilities] equal access to justice" by providing them with reasonable accommodations in courthouses and court proceedings.[8] In the report supporting the resolution, the ABA observed that "active involvement by [the] court system[]" is necessary to ensure that the ADA is fully implemented and that individuals with disabilities meaningfully participate in the justice system.[9]

The ABA has also expressed concern for the humane and nondiscriminatory treatment of prisoners. In 1963, the ABA developed the *Standards for Criminal Justice* as a guide for policymakers and practitioners working in the

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ment. *See, e.g.*, John W. Parry, Highlights, 28 Mental & Physical Disability L. Rep. 819, 820 (2004) (discussing *Miller v. King*, 384 F.3d 1248 (11th Cir. 2004), a companion case to this one in the Eleventh Circuit).

[6] ABA Section on Individual Rights & Responsibilities and the Young Lawyers Division, *Recommendation, Report No. 128* (Aug. 1989).

[7] *Id.*

[8] ABA Commission on Mental & Physical Disability Law, *Recommendation, Report No. 112* (Feb. 2002).

[9] *Id.*

criminal justice arena, and since then, ABA task forces consisting of prosecutors, defense attorneys, judges and academics have continued to update and refine the *Standards* to ensure that they provide for a "criminal justice system that is fair, balanced, and constitutionally responsive to the needs of today and the future."[10] The *Standards* have been cited widely, including by this Court, as an important guide to the administration of criminal justice.[11]

The *Standards* encourage correctional facilities to provide inmates with a decent, safe environment that meets basic constitutional norms and sound professional standards. They proscribe the "discriminatory treatment [of prisoners] based solely on race, sex, religion, or national origin," and recommend that prisons provide "appropriate facilities . . . for the physically handicapped" and "a range of mental health and mental retardation services for [mentally disabled] prisoners."[12] Moreover, the *Standards* recommend that prisoners be guaranteed access to rehabilitative programs, a "healthful place . . . to live," prompt and adequate medical treatment, access to legal materials, and the freedom to practice their

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[10] 1 ABA, *Standards for Criminal Justice*, preface at xx (2d ed. 1980). Many of the *Standards* are now in their Third Edition. A Task Force of the ABA Criminal Justice Section's Standards Committee is currently working on a revision to Chapter 23 of the *Standards*, dealing with the legal status of prisoners.

[11] *See, e.g.*, *Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796, 2806 (2005); *Wiggins v. Smith*, 539 U.S. 510, 522 (2003); *McKaskle v. Wiggins*, 465 U.S. 168, 179 (1984); *Estelle v. Williams*, 425 U.S. 501, 504 (1976).

[12] 4 ABA, *Standards for Criminal Justice*, Standard 23-6.14 (2d ed. 1980); ABA, *Criminal Justice Mental Health Standards*, Standard 7-10.2 (1989).

religion in a manner consistent with "orderly confinement and . . . security."[13]

The ABA's commitment to the humane administration of prisons was further strengthened in 2003, when the ABA established the Justice Kennedy Commission to address the "inadequacies—and the injustices—in our prison and correctional systems."[14] In August 2004, the Commission issued its report, concluding that abusive conditions in prisons and the "absence of programming [to] prepare prisoners for release" are impediments to equitable and effective prison administration.[15] In adopting the Commission's recommendations as ABA policy, the ABA House of Delegates urged correctional authorities "to ensure that prisoners are effectively supervised in safe, secure environments; that correctional staff are properly trained and supervised; . . . that allegations of mistreatment are promptly investigated . . .; [and that prisoners receive] appropriate programming, . . . treatment . . . and services."[16]

As lawyers and judges, many ABA members are in daily contact with the criminal justice system. ABA members represent clients facing possible imprisonment or prisoners challenging the conditions of their confinement. Lawyers have an interest in ensuring that all of their clients are treated in a nondiscriminatory fashion in every aspect of our system of justice.

As the national representative of the legal profession, and a strong proponent of the nondiscriminatory and humane

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[13] 4 ABA, *Standards for Criminal Justice*, Standards 23-4.3, 23-6.9, 23-5.7, 23-2.3 and 23-6.5 (2d ed. 1980).

[14] ABA Justice Kennedy Commission, *Reports with Recommendations to the ABA House of Delegates* 78 (Aug. 2004).

[15] *Id.* at 81.

[16] *Id.* at 76.

administration of justice, the ABA respectfully submits the following perspective on the issues presented in this case.

SUMMARY OF THE ARGUMENT

This case concerns Congress' authority to remedy discrimination against persons with disabilities in state correctional facilities. The Americans with Disabilities Act of 1990 (the "ADA") is a landmark civil rights statute, which seeks to remove unreasonable barriers that exclude persons with disabilities from full participation in our society. Title II of the ADA, 42 U.S.C. §§ 12131-12165 (2000), addresses discrimination by state and local governments in the provision of public services, a particularly invidious type of discrimination because it often infringes on fundamental rights. One of the central applications of Title II is to correctional facilities.

The treatment of inmates in state prisons is an integral part of the administration of justice in this country. When a state denies equal protection of the laws to an inmate with a disability, the severity of his punishment is effectively increased by reason of his disability. Such discrimination undermines the fairness of the criminal justice system. When, as a result of deliberate indifference, a state refuses reasonable accommodations to an inmate with a disability and subjects him to degrading conditions, the state does more than violate individual rights; it diminishes the legitimacy of the justice system as a whole.

Discrimination against persons with disabilities is a serious problem in the nation's prisons. The treatment petitioner Tony Goodman suffered is far from unique. In some instances, states fail to make reasonable modifications to the physical design of prisons (such as providing wheelchair-accessible cells), resulting in inhumane conditions for inmates with disabilities. In other instances, states fail to make reasonable modifications to programs they offer to the prison population generally, resulting often in the outright

exclusion of inmates with disabilities. This pattern of state conduct was well documented in the congressional findings that led to the enactment of Title II of the ADA. Even though the ADA was signed into law fifteen years ago, discriminatory conduct unfortunately persists in prisons around the country.

Title II of the ADA is a congruent and proportional response to the documented problem of unconstitutional discrimination against persons with disabilities in state correctional facilities. Title II enforces certain constitutional rights implicated by such discrimination: principally, the right to be free from cruel and unusual punishment and the right to equal protection. Congress carefully circumscribed the Title II right to leave states considerable discretion in how they administer correctional facilities, so that the conduct prohibited by Title II is closely tethered to the core constitutional violations that Title II remedies.

In *Tennessee v. Lane*, 541 U.S. 509 (2004), this Court observed that, in examining congressional authority under Section 5 of the Fourteenth Amendment, "the appropriateness of the remedy depends on the gravity of the harm it seeks to prevent." *Id.* at 523. In the class of cases before the Court, involving discrimination on the basis of disability in state correctional facilities, the harm to persons with disabilities is certainly grave. But the harm also includes the damage to the justice system that results from the unequal treatment of persons with disabilities. In cases involving prisoners' rights—as in the class of cases involving access to the courts, at issue in *Lane*—Title II of the ADA advances the profound interest in ensuring that our system of justice, from beginning to end, is free from invidious discrimination. Title II therefore lies within the scope of congressional authority under Section 5.

ARGUMENT

I. HUMANE AND NONDISCRIMINATORY TREATMENT OF PRISONERS WITH DISABILITIES IS ESSENTIAL TO ENSURING THE LEGITIMACY OF AND PUBLIC CONFIDENCE IN THE ADMINISTRATION OF JUSTICE.

The legitimacy of a system of justice "ultimately rests" upon the public's confidence that the laws are administered in a humane and nondiscriminatory fashion. *United States v. Johnson*, 323 U.S. 273, 276 (1944). Discrimination in the administration of justice "destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process." *Rose v. Mitchell*, 443 U.S. 545, 555-56 (1979).

In *Tennessee v. Lane*, 541 U.S. 509 (2004), this Court recognized that one essential element of the fair administration of justice is access to the courts. Ensuring such access, however, is only one step toward achieving a fair criminal justice system. Ensuring that correctional facilities are administered in a nondiscriminatory manner is another.

The world of punishment is perhaps the least visible aspect of the justice system. Correctional facilities are nonetheless a fundamental component of the administration of justice, and in order to maintain the legitimacy of our justice system and the public's confidence in it, state correctional facilities should treat inmates with disabilities equitably; if they fail to do so, Congress should be able to provide the mistreated prisoner with an effective remedy.

In establishing the Justice Kennedy Commission in 2003 to study the current state of the nation's prisons, the ABA recognized the integral role played by correctional facilities in the justice system, and the responsibility that society bears for their fair administration. The Commission

observed that prison conditions and prisoner reentry "are a matter of public safety as well as sound public policy."[17] Accordingly, the Commission concluded that the bar as a profession, and society as a whole, must work to make prison conditions safe and humane, and to develop and implement programs to "prepare [prisoners] for their . . . reintegration into the community."[18]

Pursuant to the obligation to administer justice impartially, correctional facilities must treat inmates in a nondiscriminatory fashion. As this Court observed in *Johnson v. California*, 125 S. Ct. 1141, 1149 (2005), "compliance with the Fourteenth Amendment's ban on racial discrimination is not only consistent with proper prison administration, but also bolsters the legitimacy of the entire criminal justice system." Upon incarceration, prisoners do not "lose 'the right to have rights'"; they "remain[] member[s] of the human family," *Spaziano v. Florida*, 468 U.S. 447, 469 n.3 (1984) (Stevens, J., concurring in part and dissenting in part), and thus retain the right to be free from all forms of invidious discrimination.

State discrimination of any kind weakens the foundations of our system of justice. As Justice Brandeis remarked: "Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example." *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting). A state's failure to treat the individuals it imprisons in a nondiscriminatory manner undermines the public's confidence in the state's impartial and effective administration of justice.

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[17] ABA Justice Kennedy Commission, *Reports with Recommendations* 83.

[18] *Id.*

Discrimination based upon disability is particularly offensive in the prison environment, where "the government's power is at its apex." *Johnson*, 125 S. Ct. at 1150; *see also Trop v. Dulles*, 356 U.S. 86, 100 (1958) ("the power to punish . . . [must] be exercised within the limits of civilized standards"). Although convicted criminals are rightly punished, "[p]ersons are sent to prison as punishment, not *for* punishment." *Battle v. Anderson*, 564 F.2d 388, 395 (10th Cir. 1977) (emphasis in original). The severity of the punishment the prisoner receives should not depend upon the mere fortuity of whether he has a disability. The prisoner suffers a total loss of freedom for a fixed period of time. The state should not be permitted effectively to enhance this punishment for certain classes of prisoners by deliberately neglecting the conditions of their confinement. The Constitution guarantees them more.

II. TITLE II OF THE ADA REQUIRES REASONABLE MEASURES TO SECURE THE RIGHTS OF PRISONERS WITH DISABILITIES.

A. Title II of the ADA Encompasses the Operations of State Correctional Facilities.

1. Congress Addressed a Long History of Unconstitutional Discrimination Against, and Exclusion of, Individuals With Disabilities in a Broad Range of Public Services, Including Correctional Facilities.

When enacting Title II of the ADA, Congress considered an extensive record of disability discrimination in the provision of public services. In fact, as this Court found in *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 371 n.7 (2001), the "overwhelming majority" of the evidence before Congress relating to disability discrimination concerned "the provision of public services and public accommodations, which areas are addressed in Titles II and III." In *Tennessee v. Lane*, 541 U.S. 509, 524 (2004), this

Court found that Congress enacted the ADA in response to a history of states' constitutional violations and against "a backdrop of pervasive unequal treatment in the administration of state services and programs, including systemic deprivations of fundamental rights." The Court also concluded that lower-court decisions revealed a pattern of unequal treatment in a wide range of public services, including the penal system. *Id.* at 525 n.11.

The congressional findings underlying Title II document a pattern of discriminatory treatment of prisoners with disabilities. For example, Congress was presented with evidence that "jailers rational[ized] taking away [disabled inmates'] wheelchairs as a form of punishment." Staff of the House Comm. on Educ. and Labor, 101st Cong., 2d Sess., in 2 *Legislative History of Pub. L. No. 101-336: The Americans with Disabilities Act* 1190 (Comm. Print 1990). Likewise, the House and Senate Subcommittees received reports highlighting "[i]nadequate treatment and rehabilitation programs [afforded to inmates with disabilities] in penal and juvenile facilities," and "[i]nadequate ability to deal with physically handicapped accused persons and convicts (*e.g.*, accessible jail cells and toilet facilities)." U.S. Comm'n on Civil Rights, *Accommodating the Spectrum of Individual Abilities* App. A at 168 (Sept. 1983). Further, a congressionally designated task force identified discrimination in the provision of public services, including the treatment of persons with disabilities in prisons and jails.[19]

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[19] *See Garrett*, 531 U.S. at 393, 405, 409, 414, 415 (appendix C to opinion of Breyer, J.) (in Alaska, "jail failed to provide person with disability medical treatment"; in Illinois, "deaf people arrested and held in jail overnight without explanation because of failure to provide interpretive services"; in Maryland, "public libraries, state prison, and other state offices lacked [telecommunications for the deaf]"; in New Mexico, "prisoners with developmental disabilities subjected to longer terms and abused by other prisoners in state correctional system"; in

2. This Court Has Held That Title II of the ADA Applies to the Operations of State Correctional Facilities.

By its terms, Title II of the ADA applies to discrimination against state prisoners. Title II covers "the services, programs, [and] activities of a public entity." 42 U.S.C. § 12132. This Court held in *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206, 213 (1998), that state prisons are public entities, and concluded therefore that "Title II of the ADA unambiguously extends to state prison inmates."

Moreover, in enacting Title II, Congress found that "discrimination against individuals with disabilities persists in such critical areas as . . . institutionalization." 42 U.S.C. § 12101(a)(3). Thus, when enacting the ADA, Congress clearly acted to remedy the discriminatory situation faced by prisoners with disabilities.

B. Title II of the ADA Requires States to Take Reasonable Measures to Remove Barriers to Accessibility in Correctional Facilities, and States' Failure to Do So Can Have the Effect of Outright Exclusion of Prisoners With Disabilities From Appropriate Services, Programs and Activities.

1. The Affirmative Responsibilities That Title II of the ADA Imposes on States Are Reasonable.

After documenting a compelling basis for action, Congress enacted the ADA's fairly limited obligations. Title II of the ADA prohibits the states from discriminating against qualified persons with disabilities in the administration of

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North Carolina, "police arrested and jailed deaf person without providing interpretive services").

services, programs or activities. 42 U.S.C. § 12132. The ADA's regulations require a state to make "reasonable modifications in [the state's] policies, practices, or procedures if necessary to avoid the exclusion of individuals with disabilities." 28 C.F.R. § 35.130(b)(7) (2005). However, the ADA's reach is limited in several ways.

First, the ADA applies only to "qualified individuals"—those eligible for the services, programs and activities offered by the state. A "qualified individual" under the ADA is an individual "who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2). This limitation means that the ADA does not eliminate the ability of state prison administrators to exclude an individual from programs or activities based on factors other than disability.

Even if an individual is "qualified," the ADA's scope is further limited by the fact that the Act requires only "reasonable modifications." The Act does not require states to utilize any and all means to render services accessible; it requires only "reasonable modifications" to the rules, policies or practices of public entities, as well as the implementation of reasonable measures to remove architectural and other barriers to accessibility and the provision of auxiliary aids and services. *Id.* § 12131(2).

The Act's implementing regulations clarify the limited nature of states' affirmative responsibilities. For instance, modifications to accommodate persons with disabilities need not be made if the modifications would "fundamentally alter the nature of the service, program, or activity," 28 C.F.R. § 35.130(b)(7), or would impose "undue financial or administrative burdens," *id.* § 35.150(a)(3).

Title II's modest affirmative conduct requirement is needed to prevent discrimination on the basis of disability. Although anti-discrimination policies generally may dictate that similarly situated persons be treated the same way, treating everyone identically, without making reasonable accommodations, can *constitute* discrimination for persons with disabilities. For example, prison vocational training may be theoretically available to all inmates, but if it is held in a room that can be reached only by climbing up a flight of stairs, a person who uses a wheelchair cannot participate. Similarly, physical facilities such as showers, toilets and sinks that are adequate for most inmates can result in unhygienic and inhumane conditions for Mr. Goodman and similarly situated inmates. As the Civil Rights Commission has noted, "[s]uch an approach [of identical treatment] would give the form, but not the substance of equal opportunity." *Accommodating the Spectrum* 99.

Congress understood when enacting the ADA that addressing the needs of individuals with disabilities "would sometimes require not blindfolded equality, but responsiveness to difference; not indifference, but accommodation." *Lane*, 541 U.S. at 536 (Ginsburg, J., concurring).[20] Similarly, this Court in *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721, 738 (2003), upheld the leave requirement of the Family and Medical Leave Act of 1993 because "simply mandat[ing] gender equality in the administration of leave benefits" would have been insufficient to overcome sex-role stereotypes about child-care responsibilities. Like the requirement of affirmative conduct by the states upheld in *Hibbs* to remedy discrimination against women, Title II of the ADA requires states to act affirma-

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[20] *See generally* Samuel R. Bagenstos, *"Rational Discrimination," Accommodation, and the Politics of (Disability) Civil Rights*, 89 Va. L. Rev. 825 (2003); Christine Jolls, *Antidiscrimination and Accommodation*, 115 Harv. L. Rev. 642 (2001).

tively in order to prevent discrimination against persons with disabilities.[21]

2. States' Failure to Remove Barriers to Accessibility in Correctional Facilities Can Have the Effect of Outright Exclusion of Prisoners With Disabilities From Appropriate Services, Programs and Activities.

Inmates with disabilities encounter discrimination in many aspects of prison life. Reported cases document the failure of state prison administrators to remove "architectural . . . barriers." 42 U.S.C. § 12131(2). The ABA has urged, as part of nondiscriminatory treatment of prisoners, that "[a]ppropriate facilities . . . should be provided for the physically handicapped." *Standards for Criminal Justice*, Standard 23-614. Nonetheless, inmates with disabilities are often denied the most basic services, such as access to toilets, showers, recreational areas and meals. *See, e.g., Kaufman v. Carter*, 952 F. Supp. 520 (W.D. Mich. 1996) (showers and commode were inaccessible for double amputee). Lack of sanitary facilities for prisoners with disabilities can lead to degrading conditions, such as in the case before the Court, where Mr. Goodman "was forced to sit in his own bodily waste." (Appendix of Petitioner Goodman 18a.)

Likewise, when state prison administrators fail to make the "reasonable modifications to rules, policies, or practices" required by the ADA, 42 U.S.C. § 12131(2), inmates with disabilities can be denied meaningful participation in prison

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[21] The same is true of other civil rights laws. For example, in *Lau v. Nichols*, 414 U.S. 563, 566 (1974), the Court ruled that a school system's failure to provide bilingual education to students whose primary language was not English constituted discrimination prohibited by Title VI of the Civil Rights Act of 1964 and declared that "there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education."

programs. For example, one court found that prison officials had violated deaf and hearing-impaired inmates' rights under the ADA because they denied those inmates the benefits of participation in education, vocational and rehabilitative classes. Moreover, because the prison failed to provide an interpreter, the inmates could not participate meaningfully in disciplinary, grievance and parole hearings. *Clarkson v. Coughlin*, 898 F. Supp. 1019 (S.D.N.Y. 1995); *see also Kruger v. Jenne*, 164 F. Supp. 2d 1330 (S.D. Fla. 2000) (blind prisoner stated a claim of discrimination when prison's failure to accommodate him resulted in denial of access to law library).

These cases are directly analogous to the denial of court access this Court considered in *Lane* in that persons with disabilities are entirely excluded from state services, programs and activities. Congress' chosen remedy for this pattern of exclusion—Title II's requirement of program accessibility and the duty to accommodate—remains a "limited one." *Lane*, 541 U.S. at 531. However, Congress recognized "that failure to accommodate persons with disabilities will often have the same practical effect as outright exclusion," and thus "required the States to take reasonable measures to remove . . . barriers to accessibility." *Id.*

As Judge Posner observed in *Crawford v. Indiana Department of Corrections*, 115 F.3d 481, 486 (7th Cir. 1997): "Rights against discrimination are among the few rights that prisoners do not park at the prison gates." All prisoners should have meaningful access to prison programs, particularly those "designed to help [the inmate] become a productive member of society upon his release from prison." *Id.* As the ABA's Justice Kennedy Commission found, prison

rehabilitative programs help to reduce recidivism.[22] Permitting prisoners to be excluded on the basis of disability from such programs, which are an integral part of the justice system, contravenes the goals of the justice system.

C. States Can Comply With the Requirements of Title II of the ADA Consistent With the Need for Security in Correctional Facilities.

This Court has recognized that the challenges of prison administration require that some deference be given to prison officials, who are burdened with the tasks of protecting and controlling their prison populations while simultaneously managing large facilities on limited budgets. In *Turner v. Safley*, 482 U.S. 78, 89 (1987), the Court held that, when a prison regulation impinges on inmates' constitutional rights, "the regulation is valid if it is reasonably related to legitimate penological interests."

This Court's application of the *Turner* factors shows the standard of review to be deferential, but not toothless. In *Turner* itself, the Court upheld a ban on prisoner-to-prisoner correspondence, *id.* at 91, while striking down a ban on most inmate marriages, *id.* at 97. Although "legitimate security concerns may require placing reasonable restrictions upon an inmate's right to marry," *id.*, this Court found that the scope of the ban in *Turner* was too expansive to be reasonable. *Turner* leaves room for meaningful judicial review of prison

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[22] The Commission emphasized the need to prepare prisoners for release back into the community, so as "to avoid recidivism, and to maximize the chances that former prisoners will work, pay taxes, rear families and become contributing members of their communities." ABA Justice Kennedy Commission, *Reports with Recommendations* 86. As a result of the Commission's report, the ABA last year adopted a resolution urging correctional authorities, "from the beginning of incarceration, [to] provide appropriate programming, including substance abuse treatment, educational and job training opportunities, and mental health counseling and services." *Id.* at 76.

practices as well as legislative involvement in prison affairs. *See, e.g., Cutter v. Wilkinson*, 125 S. Ct. 2113 (2005) (upholding a federal statute requiring a "compelling governmental interest" before limits on prisoners' religious practices are permitted); *Johnson v. California*, 125 S. Ct. 1141 (2005) (applying strict scrutiny to a policy of segregating prisoners by race).

In keeping with the deferential constitutional standard set forth in *Turner*, the ADA provides prison officials with flexibility where there is some justification for their policies. "Terms like 'reasonable' . . . are relative to circumstances, and the circumstances of a prison are different from those of a school, an office, or a factory, as the Supreme Court has emphasized in the parallel setting of prisoners' constitutional rights." *Crawford*, 115 F.3d at 487. Although what qualifies as a "reasonable modification" depends upon the specifics of each situation, it is clear that the "reasonable modification" requirement does not require prison administrators to compromise on prison safety. For example, the ADA never requires the inclusion of an individual who poses a direct threat to the health or safety of others. *See Doe v. Woodford County Bd. of Educ.*, 213 F.3d 921 (6th Cir. 2000). If a qualified prisoner can be safely included in a program or activity, prison officials can determine the best method of accommodation from the range of options available. *See* 28 C.F.R. § 35.150(b)(1) (allowing the use of "any other methods that result in [accessibility]").

Consistent with *Turner*, the ADA calls on prison officials to determine whether there is a legitimate reason for the exclusion of a disabled individual, consider the range of possible accommodations, and then evaluate the impact that the accommodations may have on prison management, all before requiring any action. In this way, the ADA ensures that the rights of persons with disabilities are served without interfering with effective prison administration.

III. THE REASONABLE MEASURES REQUIRED BY TITLE II OF THE ADA ARE ESSENTIAL TO PROTECTING FUNDAMENTAL RIGHTS OF PRISONERS WITH DISABILITIES.

The conduct covered by Title II of the ADA includes acts—or failures to act—that violate the prohibition on cruel and unusual punishments in the Eighth Amendment (as incorporated into the Fourteenth Amendment) and other fundamental constitutional rights, as well as the Equal Protection Clause of the Fourteenth Amendment. The "reasonable modifications" required by Title II represent a prophylactic measure designed to prevent constitutional violations, and, as a result, Title II represents a legitimate exercise of congressional authority.

A. States' Failure to Make Reasonable Modifications for Prisoners With Disabilities Results in Eighth Amendment Violations.

Title II of the ADA is Congress' chosen remedy to address the pattern of exclusion and discrimination that leads to "cruel and unusual punishment" of disabled inmates in violation of the Eighth Amendment. The Eighth Amendment prohibits "punishments which are incompatible with the evolving standards of decency that mark the progress of a maturing society." *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (internal citation omitted). By mandating reasonable modifications to prison rules, policies and procedures, Title II ensures that the medical care and other conditions of confinement for inmates with disabilities do not fall below the constitutional standard.

The Eighth Amendment imposes an affirmative obligation on state officials to provide for the basic needs of inmates. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). This affirmative obligation extends to inmates with disabilities. *See LaFaut v. Smith*, 834 F.2d 389, 394 (4th Cir. 1987) (Powell, J.) (state officials may "not ignore the basic needs of

a handicapped individual or postpone addressing those needs out of mere convenience or apathy"). In order to meet the basic physical and medical needs of inmates with disabilities, prison officials may need to make reasonable modifications to prison services, programs and activities. These modifications can range from the provision of physical aids that assist in movement, *see Weeks v. Chaboudy*, 984 F.2d 185, 187 (6th Cir. 1993), to ongoing therapeutic care, *see Langley v. Coughlin*, 888 F.2d 252, 254 (2d Cir. 1989), to selecting and training employees to recognize the needs of mentally ill prisoners, *see Young v. City of Augusta*, 59 F.3d 1160, 1171 (11th Cir. 1995).

The Eighth Amendment also prohibits prison officials from being "deliberately indifferent" to an inmate's conditions of confinement. *Wilson v. Seiter*, 501 U.S. 294, 303 (1991). For inmates with disabilities, the deliberate failure of a prison official to make reasonable modifications can result in unhygienic and degrading conditions of confinement. *See, e.g., Leach v. Shelby County Sheriff*, 891 F.2d 1241, 1243 (6th Cir. 1989) (finding Eighth Amendment violation where paraplegic inmate was "not bathed for several days" and "was forced to remain for long periods of time in his own urine due to inadequate catheter supplies and was given inadequate aid for his bowel training needs despite his repeated requests for help"), *cert. denied*, 495 U.S. 932 (1990). As Mr. Goodman's experience demonstrates, violations of the Eighth Amendment rights of prisoners with disabilities continue to this day.

Certain conditions of confinement "may establish an Eighth Amendment violation 'in combination' when each would not do so alone, [so long as] they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need." *Wilson*, 501 U.S. at 304. For example, in *Kiman v. New Hampshire Department of*

Corrections, 301 F.3d 13 (1st Cir. 2002), *vacated for reh'g en banc*, 332 F.3d 29 (1st Cir. 2003),[23] prison officials knew that an inmate had Lou Gehrig's disease but failed to make reasonable accommodations, such as "[p]ermitting him the means for his daily walks, cuffing his hands in front rather than in back, providing him with a chair for his shower, exempting him from food lines, and giving him a cell that did not require him to climb stairs." *Id.* at 24-25. Failure to do any one of these things may not alone have been a constitutional violation, but the court held that collectively they demonstrated "deliberate indifference" to the inmate's conditions of confinement and violated the Eighth Amendment. These types of accommodations—"matters of apparently small import to the prison yet of enormous significance" to the inmate, *id.* at 24-25—are required by Title II of the ADA.

The affirmative obligations required by Title II are congruent and proportional with those imposed by the Eighth Amendment. As the *Kiman* court observed, "many constitutional violations . . . overlap with Title II as it is applied to prisons." 301 F.3d at 23. Title II requires only that modifications for disabled inmates be "reasonable." Thus, like the Eighth Amendment, the ADA permits deference to legitimate state penological interests. *See Turner*, 482 U.S. at 89-90. Moreover, a number of courts of appeals have held that suits for money damages against the states under Title II require a showing that prison officials acted with "deliberate indifference" (similar to the standard for Eighth Amendment

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[23] This Court granted the petition for writ of *certiorari*, vacated the judgment and remanded for reconsideration in light of *Lane*. 541 U.S. 1059 (2004).

violations). *See Duvall v. County of Kitsap*, 260 F.3d 1124, 1138-39 (9th Cir. 2001).[24]

The Eighth Amendment "embodies broad and idealistic concepts of dignity, civilized standards, humanity, and decency." *Estelle*, 429 U.S. at 102 (internal citation omitted). When this Court first concluded that medical care for inmates was required under the Eighth Amendment, the Court looked to legislation that had been enacted by states at that time as validation that such a requirement was consistent with "contemporary standards of decency." *Id.* at 104 & n.8. So too, "the ADA reflects . . . contemporary standards of decency concerning treatment of individuals with disabilities." *Schmidt v. Odell*, 64 F. Supp. 2d 1014, 1031 (D. Kan. 1999). Title II of the ADA represents the current, national consensus on "contemporary standards of decency," *cf. Atkins v. Virginia*, 536 U.S. 304, 313-17 (2002) (examining the "national consensus" on capital punishment of mentally retarded persons), and failure to make the accommodations required by Title II will often result in Eighth Amendment violations.

B. States' Failure to Make Reasonable Modifications Deprives Prisoners With Disabilities of Other Fundamental Rights.

Title II of the ADA protects a number of other constitutional rights of prison inmates in addition to the prohibition against cruel and unusual punishment. These other constitutional rights buttress Congress' ability to enact Title II under Section 5 of the Fourteenth Amendment.

Prison inmates have constitutional rights to the free exercise of religion, *Cruz v. Beto*, 405 U.S. 319, 322 n.2 (1972),

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[24] Similarly, recipients of federal funding are liable under Title IX of the Civil Rights Act of 1964 for "deliberate indifference" to sexual harassment. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999).

and to an adequate law library or other legal assistance, *Bounds v. Smith*, 430 U.S. 817 (1977). These rights are both vital to prisoners and consistent with sound prison administration: the ABA's *Standards for Criminal Justice* urge that prisoners be provided with the freedom to practice their religion, Standard 23-6.5, and have access to suitable legal materials, Standard 23-2.3. If Mr. Goodman and other inmates with disabilities are not reasonably accommodated such that they have meaningful access to these programs, there is a real risk that their constitutional rights will be infringed upon. By enacting Title II of the ADA, Congress ensured that these rights (among others) would be protected for inmates with disabilities.

Moreover, inmates with disabilities have liberty interests under the Due Process Clause, which Title II of the ADA protects. For example, the Ninth Circuit held that placing a paralyzed inmate who used a wheelchair into administrative housing, where he could not use the wheelchair, deprived him of a liberty interest without due process. *Serrano v. Francis*, 345 F.3d 1071, 1079 (9th Cir. 2003), *cert. denied*, 125 S. Ct. 43 (2004). While "administrative segregation in and of itself does not implicate a protected liberty interest," a disabled inmate's "disability—coupled with administrative segregation in [a housing unit] that was not designed for disabled persons—gives rise to a protected liberty interest." *Id.* at 1078-79; *see also Bonner v. Arizona Dep't of Corr.*, 714 F. Supp. 420 (D. Ariz. 1989) (due process violation when sign language interpreter denied for inmate disciplinary hearing). Title II of the ADA serves to protect against due process violations of this kind.

Given the broad scope of constitutional rights implicated by failing to accommodate for an inmate's disabilities, Title II of the ADA represents "a reasonable prophylactic measure, reasonably targeted to a legitimate end." *Lane*, 541 U.S. at 533.

C. States' Irrational Exclusion of Prisoners With Disabilities From Prison Services, Programs and Activities Results in Equal Protection Violations.

Title II of the ADA is further supported by Congress' authority under Section 5 of the Fourteenth Amendment to enforce the Equal Protection Clause. This Court's precedents make clear that the Equal Protection Clause prohibits discrimination based on irrational prejudice against members of a distinct minority group, even though the affected class may not be the result of a "suspect" or "quasi-suspect" classification, and even though the interests involved may not themselves be considered "fundamental." Classification on the basis of disability is subject to rational basis review. *See Garrett*, 531 U.S. at 366-68. But the nature of discrimination against persons with disabilities in state correctional facilities means that much of the conduct proscribed by Title II of the ADA is irrational, and therefore violates the Equal Protection Clause.

For example, in *Plyler v. Doe*, 457 U.S. 202 (1982), this Court held that a state statute denying public education to the children of illegal aliens violated equal protection. The Court made clear that illegal aliens are not a "suspect class," and a free public education is not a "fundamental right" under the Constitution. *Id.* at 223. Nonetheless, the Court struck down the statute because it failed to satisfy rational basis review. The Court observed that the statute "is directed against children, and imposes [a] discriminatory burden on the basis of a legal characteristic over which children can have little control." *Id.* at 220. The interest affected, although not constitutionally protected, is an important one: "education has a fundamental role in maintaining the fabric of our society." *Id.* at 221. As a result of the combination of the discrete nature of the affected class and the importance of the underlying interest, the Court concluded that "[i]t is . . . difficult to conceive of a rational justification for penalizing these children." *Id.* at 220.

This Court applied a similar approach in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), and *Romer v. Evans*, 517 U.S. 620 (1996). In each case, no "suspect" or "quasi-suspect" classification was involved, yet the Court found equal protection violations under rational basis review. In these cases, the importance of the individual interest involved informed the rationality review, and the Court concluded that the differential treatment was motivated by prejudice against the minority group. *See Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring in the judgment) ("When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.").

Deliberate indifference to the plight of disabled prison inmates when reasonable modifications are available demonstrates irrational prejudice and violates the Equal Protection Clause. To be sure, prejudice against persons with disabilities is often the result of indifference, rather than animus. *Alexander v. Choate*, 469 U.S. 287, 295 (1985); *see also Garrett*, 531 U.S. at 375 (Kennedy, J., concurring) ("There can be little doubt, then, that persons with mental or physical impairments are confronted with prejudice which can stem from indifference or insecurity as well as from malicious ill will."). But deliberate indifference to an individual's disability can amount to invidious discrimination. The failure to anticipate the presence of persons with disabilities in designing prisons and prison policies is not a neutral, rational act; it is based upon prejudice and stereotypes.

Unlike Title I of the ADA, which this Court held in *Garrett* is not congruent with the Equal Protection Clause, 531 U.S. at 365-68, Title II, as applied to state correctional facilities, involves significant liberty interests of individuals in state custody. The constitutional guarantee of equal protection applies more rigorously when individuals are

subjected, on the basis of disability, to harsher prison conditions and thereby experience what amounts to a more severe punishment. Moreover, the vital interest in the nondiscriminatory administration of justice in state correctional facilities leads, as in *Lane*, to more searching equal protection review.[25] In the area of state correctional facilities, Title II of the ADA therefore provides a congruent remedy to enforce the Equal Protection Clause.

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[25] For similar reasons, two courts of appeals have held that Title II of the ADA is a valid exercise of Congress' Section 5 authority as applied to public education. As with nondiscrimination in prisons, full participation by persons with disabilities in education "is vital to the future success of our society," and "the gravity of the harm" from discrimination in such a core governmental function "is vast and far reaching." *Association for Disabled Americans, Inc. v. Florida Int'l Univ.*, 405 F.3d 954, 957-58 (11th Cir. 2005); *see also Constantine v. Rectors and Visitors of George Mason Univ.*, 411 F.3d 474, 490 (4th Cir. 2005) ("[I]t is more likely that disability discrimination in the context of a State's operation of public education programs will be unconstitutional than discrimination in the context of public employment.").

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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UNITED STATES,
Petitioner,

v.

STATE OF GEORGIA, *et al.*

TONY GOODMAN,
Petitioner,

v.

STATE OF GEORGIA, *et al.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF AMICI CURIAE FOR PARALYZED VETERANS OF AMERICA, EASTER SEALS AND TEN OTHER ORGANIZATIONS SUPPORTING PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are organizations of people with disabilities, public interest groups, and professional organizations that advocate for the rights of people with disabilities.[2] *Amici* and their members have a vital interest in effective enforcement of Title II of the Americans with Disabilities Act ("ADA") and, to that end, in the Court's correct recognition of Congress' abrogation of Eleventh Amendment immunity for ADA violations. That result is required in order to ensure that persons with disabilities can vindicate and enforce their rights and can obtain the full range of remedies Congress enacted.

SUMMARY OF ARGUMENT

In *Tennessee* v. *Lane*, 541 U.S. 509, 524 (2004), this Court described the "backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights" before Congress when it enacted Title II of the ADA. The Court recounted State governments' long history of mistreating Americans with a broad range of physical and mental disabilities. *Id.* at 524-27. Among other things, the Court recognized State

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[1] Letters of consent have been filed with the Clerk. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

[2] *Amici* are the Paralyzed Veterans of America, Easter Seals, the American Association of Retired Persons, the American Association of People with Disabilities, the Epilepsy Foundation, the National Federation of the Blind, the Polio Society, the Association on Higher Education and Disability, United Cerebral Palsy Associations, Inc., the National Lawyers Guild, the National Council on Independent Living, and the National Mental Health Consumers' Self-Help Clearinghouse.

patterns "of unequal treatment in . . . the penal system," as well as more generally "in the administration of justice." *Id.* at 525.

In addition to this unequal treatment within the justice system, the Court described evidence before Congress that States violated the constitutional rights of people with disabilities by preventing them from voting, marrying, and serving as jurors; by committing them to State institutions without justification and abusing and neglecting them while in those institutions; by irrationally discriminating against them in decisions about where they could live; and by engaging in a pattern of discrimination in a wide range of other public services and programs, including public education. *Id.*

Noting the "sheer volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities in the provision of public services," *id.* at 528-29, the Court unequivocally concluded that the "extensive record of disability discrimination" existing when Congress enacted the ADA "makes clear beyond peradventure that inadequate provision of public services . . . was an appropriate subject for prophylactic legislation" through Title II of the ADA. Indeed, as the Court recognized, Congress described the pervasive pattern of State-sponsored discrimination in the body of the ADA itself: "[D]iscrimination against individuals with disabilities persists in such critical areas as . . . education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." *Id.* at 529.

Lane, therefore, resolved the first part of the "congruence and proportionality" test by which this Court analyzes the constitutionality of Congress' abrogation of Eleventh Amendment immunity, *viz.*, whether Congress enacted Title II in response to a history and pattern of unequal State treatment. Yet, the record of State

unconstitutional treatment of Americans with disabilities – including mistreatment of prisoners – is significantly more extensive than *Lane* recited. *Amici* will focus on that extensive historical record of discrimination. Because *amici* anticipate that the parties will detail the pervasive evidence of State-sponsored unconstitutional treatment of imprisoned people with disabilities contained in Congress' legislative record, this brief will avoid replowing that ground and will therefore focus on the compelling and well-documented history of State unconstitutional conduct – in prisons and other contexts – reported in the judicial decisions and the public record that predate the ADA. Such conduct victimized persons with disabilities not only in the context of prisons, but in many aspects of the administration of justice, and also in additional contexts where fundamental rights were violated. These areas include discrimination against persons with disabilities in such basic aspects of civic, societal and personal endeavors as jury service, institutionalization, education, voting rights, and the rights to marry and raise families.

At the end of the day, the historical record amply confirms what is also plain in Congress' specific statutory findings and in the legislative history: Congress properly exercised its power under §5 of the Fourteenth Amendment when it abrogated the States' Eleventh Amendment immunity for violations of Title II of the ADA, and Title II represents a congruent and proportional response to the longstanding pattern of State constitutional violations.

ARGUMENT

The States Have Historically Deprived Americans With Disabilities Of Their Constitutional Rights

Tennessee v. *Lane*, 541 U.S. 509 (2004), reiterated the established test for determining whether an act of Congress validly abrogates State immunity. After first identifying the constitutional rights at issue, the inquiry then focuses on whether there is a sufficient support for Congress' determination to regulate, and, finally whether the act "is an appropriate response to this history and pattern of unequal treatment." *Id.* at 530. In holding that Congress properly abrogated state immunity from damages in ADA claims related to appropriate access to the court system as part of the administration of justice, *Lane* concluded that Title II of the ADA responded to a long history and pattern of pervasive, irrational, intentional, and unconstitutional discrimination by the States – including, specifically, unequal treatment of prisoners with disabilities.

Lane clarified that the abrogation issue must be analyzed based on the specific constitutional rights at issue in each particular case. Accordingly, *Lane* fully analyzed "the class of cases implicating the fundamental right of access to the courts," part of the system for the administration of justice. *Id.* at 533-34. This case, too, deals with the system of the administration of justice – after trial and in the penal system. *Lane*'s rationale applies equally to the pervasive unequal treatment of prisoners with disabilities as it does to the unconstitutional treatment of litigants with disabilities.

Viewed in proper perspective, respondents' position in this case seeks to create an exception to the holding in *Lane*. That result is wholly unwarranted, especially where *Lane* itself made several determinations applicable to this case. First, in considering the history of unconstitutional conduct upon which Congress based

Title II, *Lane* looked at the entire range of unconstitutional conduct that Congress considered, not merely the conduct in the particular area at issue in the particular case. *Id.* at 524 ("Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights").

Second, *Lane* made plain that courts considering the historical backdrop to a Congressional enactment are not limited to reviewing only the legislative record, but also must look to the existing judicial and public record. *Id.* at 529 (reviewing judicial decisions, then–extant statutes, and "statistical, legislative and anecdotal evidence" of the widespread exclusion of persons with disabilities from public services).

Third, the Court described in detail the ample record of unconstitutional conduct that the ADA was designed to remedy: "The ADA was passed by large majorities in both Houses of Congress after decades of deliberation and investigation into the need for comprehensive legislation to address discrimination against persons with disabilities." *Id.* at 516. The Court cited specific evidence of unconstitutional conduct in the areas of prisons, voting rights, marriage, jury service, institutionalization, access to the judicial system, and public education. *Id.* at 524-25.

Finally, and most important, *Lane* concluded that the "extensive record" before Congress demonstrated that it enacted Title II in response to a history and pattern of state-sponsored discrimination. *Id.* at 528 ("Given the sheer volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities in the provision of public services, the dissent's contention that the record is insufficient to justify Congress' exercise of its prophylactic power is puzzling").

In the legal context set by *Lane*, and to help inform this Court's consideration of the historical record of States' prior mistreatment of people with disabilities, *amici* will address multiple examples of the States' unconstitutional conduct that justified Congress in authorizing suits against States for damages under §5 of the Fourteenth Amendment.

A. Patterns of Unconstitutional State Treatment of Persons with Disabilities in the Administration of Justice.

Lane noted the "pattern of unequal treatment" within the system of the administration of justice, including the treatment of persons with disabilities as jurors; as litigants and criminal defendants; and as prisoners. *Id.* at 525 & nn. 9,11,14. *Lane* has already held that Title II "constitutes a valid exercise of Congress' §5 authority to enforce the guarantees of the Fourteenth Amendment" within the context of the system of justice "implicating the fundamental right of access to the courts." *Id.* at 534. No reason exists to exclude other components of the administration of justice, especially where *Lane* expressly referenced the very conduct involved in this case: discrimination against prisoners with disabilities. *Id.* at 525 n.11 (citing and reciting the specific "unequal treatment" in *La Faut* v. *Smith*, 834 F.2d 389, 394 (4th Cir. 1987)(inaccessible toilet facilities for inmate with paraplegia); *Schmidt* v. *Odell*, 64 F. Supp.2d 1014 (D. Kan. 1999)(prisoner with amputated limbs compelled to crawl on jail floor); *Key* v. *Grayson*, 179 F.3d 996 (6th Cir. 1999)(prisoner with disability denied access to program antecedent to parole), *cert. denied*, 528 U.S. 1120 (2000).

1. State Mistreatment of Persons with Disabilities in Penal Institutions.

In enacting the ADA, Congress found continuing State-sponsored discrimination in the "critical" area of "institutionalization," and specifically noted pervasive discrimination against people with disabilities. *See* 42 U.S.C. §12101(a)(3),(5). The record before Congress when it passed Title II was replete with examples of State-sponsored discrimination in penal institutions (as well as in civil institutions).

Such discrimination still exists (as it did when Title II was enacted), contrary to the Eighth Amendment's prohibition of disproportionate punishments, *Weems* v. *United States*, 217 U.S. 349, 366-67 (1910), and of "unnecessary and wanton infliction of pain," *Gregg* v. *Georgia*, 428 U.S. 153, 173 (1976) (plurality opinion). The Constitution also forbids State prisons from acting with deliberate indifference to the medical needs of prisoners with disabilities, *Estelle* v. *Gamble*, 429 U.S. 97, 106 (1976), because this practice subjects prisoners with disabilities to multiple punishments: in addition to their sentences, they suffer unnecessary pain, loss of dignity, and, in some cases, a shortened lifespan.

Despite these constitutional protections, State prisons nonetheless abused prisoners with disabilities, denying them fundamental rights. For example, a Michigan prison routinely forced two inmates with paraplegia to sit in their own feces for hours, causing medical complications. *Parrish* v. *Johnson*, 800 F.2d 600, 602-03 (6th Cir. 1986). Staff habitually refused to relay the prisoners' requests for aid to nurses, and deliberately placed their food trays in inaccessible positions. Moreover, prison officials did nothing to stop a guard who on multiple occasions assaulted the inmates with a knife and frequently called one inmate a "'crippled bastard'" who should be dead. *Id.* at 603. Clearly, the State's conduct

furthered "[n]o legitimate penological or institutional objective." *Id.* at 605.

Similarly, in *LaFaut* v. *Smith*, 834 F.2d 389, 392 (4th Cir. 1987), a prisoner in a wheelchair was denied adequate toilet facilities. "[I]n order to use the toilet, he had to lie on the floor, drag his body across it, and then pull himself up onto the commode." He would often "slip down into the toilet bowl water." *Id.* On one occasion, the plaintiff "fell off the toilet and broke his right leg." *Id.* at 393. As a result of these conditions, the prisoner relied on a catheter and contracted a kidney infection. *Id.* at 392-93. Although aware of plaintiff's situation, which could have been avoided by "the simple mounting of a handicap bar," the prison took no action for months. *Id.* at 393. The court concluded that this "neglect constituted 'deliberate indifference' and therefore violated the Eighth Amendment." *Id.* at 394. *See also Miranda* v. *Munoz*, 770 F.2d 255, 257 (1st Cir. 1985) (pre-trial detainee with epilepsy "received no medical attention" and died); *Wellman* v. *Faulkner*, 715 F.2d 269, 272, 274 (7th Cir. 1983) (prison's medical system did not meet constitutional standards for prisoners who had colostomies, who were "forced to wash out and re-use [single-use waste-collection] bags," a "practice [that] literally stank" and for prisoners with mental disorders who had no treatment because the "position of staff psychiatrist has been unfilled for over two years"); *Westlake* v. *Lucas*, 537 F.2d 857, 859 (6th Cir. 1976) (denying defendants' motion to dismiss §1983 claim brought by prisoner suffering from ulcer, who was denied medical treatment, resulting in the vomiting of blood); "Hearing Set on the Treatment of Disabled Prisoners," *The New York Times* at 43 (Jan. 17, 1974) (describing tour by chair of State Senate Select Committee for the Mentally and Physically Handicapped of four New York City prison wards in preparation for upcoming hearings).

One Pittsburgh jail required almost two decades, and repeated judicial directives, to remedy its "constitutionally impermissible" treatment of prisoners with physical and mental disabilities. *Owens-El* v. *Robinson*, 442 F. Supp. 1368, 1380 (W.D. Pa. 1978). "Inmates with epilepsy" experiencing seizure and "those with possible severe mental disorders were routinely and "inappropriately" placed in restraints:

> In this bleak room the inmates are placed in a hospital gown or naked on a canvas cot with a hole cut in the middle. Their body wastes drop through the hole into a tub on the floor underneath the cot. The tub is emptied twice a day. These inmates are shackled by leather restraints to the canvas cots. . . . The medical logs, introduced into evidence, revealed that inmates have been held in such restraints for as long as twenty-nine days.

Id. at 1380. The court held that the "present mode of using the restraint room is constitutionally impermissible." *Id.* at 1381. Two years later, the district court, after a remand for further consideration of mental health care for inmates, made the additional finding that there was "no system for care of mentally ill inmates in the jail and that the haphazard and inconsistent care and protection now being afforded is far below minimum standards," which "aggravate[d] – rather than alleviate[d] – the conditions of many of the most seriously ill. *Inmates of the Allegheny County Jail* v. *Peirce*, 487 F. Supp. 638, 643 (W.D. Pa. 1980). But the district court's orders were not sufficient to remedy the problems. Years later, the inmates were forced to seek a contempt citation for defendants' failure to comply with the prior orders, and to seek additional relief, contending that "unconstitutional conditions which existed . . . in 1978 still were extant in 1983." *Inmates of the Allegheny County Jail* v. *Wecht*, 565

F. Supp. 1278, 1280 (W.D. Pa. 1983). One of these conditions was defendants' failure to maintain a log documenting the use of restraints. *Id.* at 1285. Another was defendants' failure to comply with the mental health standards set forth in the 1980 order. *Id.* at 1287-88. Five years later, the inmates again sought sanctions, in part because "the quality of the physical and mental health care provided to inmates [was] deteriorating." *Inmates of the Allegheny County Jail* v. *Peirce*, 699 F. Supp. 1137, 1141 (W.D. Pa. 1988). The unconstitutional conditions were not ultimately resolved until the construction of a new jail in 1994, eighteen years after the plaintiffs first filed suit. *Inmates of the Allegheny County Jail* v. *Peirce*, 848 F. Supp. 52 (W.D. Pa. 1994).[3]

West Virginia "denie[d] prisoners [transferred to] mental institutions the equal protection of the law" by refusing to consider them for parole until they had recovered from their mental illness, instead of when they were "no longer likely to cause serious harm" to themselves or others. *Sites* v. *McKenzie*, 423 F. Supp. 1190, 1194-95 (N.D.W.Va. 1976). And these are but a few of the frequently recurring instances of mistreatment of prisoners with mental disabilities or illnesses.[4]

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[3] In its 1994 order, the trial judge responded to criticism that he had coddled inmates: "I need only remember the stench which assailed the nostrils when I entered the jail for the first time in 1976, or recall the sight of human beings strapped down on canvas cots, their wrists and ankles held tight by leather thongs, to take comfort in believing that regardless of what the critics said, what I ordered was the right thing to do." *Id.* at 53.

[4] *See, e.g.*, *Waldrop* v. *Evans*, 871 F.2d 1030, 1032 (11th Cir. 1989) (denying defendant prison doctors' motions for summary judgment on issue of qualified immunity on Eighth Amendment claim after prisoner with mental illness "slashed his own forearm," "gouged out his left eye," used a prison-issued razor blade to cut his scrotum, losing both testicles," and "damaged [his right eye] so badly that he lost sight"); "Study Cites Lack of

Even after enactment of the ADA, unconstitutional treatment of prisoners with disabilities by the States persists. In *Durham* v. *Nu'Man*, 97 F.3d 862, 866 (6th Cir. 1996), a mentally ill inmate in shackles was beaten for ten minutes and had his arm broken by two guards because he refused to clean up his urine from the floor after a nurse refused access to a bathroom. And in several cases brought after enactment of the ADA, prisoners with amputated limbs or who used wheelchairs sought redress for their inability to access showers, use the toilet, or even

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Programs for Retarded Inmates in U.S.," *The New York Times*, p. A17 (June 14, 1982) (describing survey by the National Criminal Justice Reference Service of deficiencies in prisons nationwide to accommodate prisoners with mental retardation).

The court in *Ramos* v. *Lamm*, 485 F. Supp. 122, 142 (D. Colo. 1979), *aff'd in relevant part*, 639 F.2d 559 (10th Cir. 1980), examined the appalling conditions in a Colorado maximum security prison, including the "emergency situation" in existence for prisoners with mental health needs, which situation amounted to a "time bomb ready to explode." Not only did the prison lack "adequate staff trained in psychology or psychiatry," but in fact the "psychology department was abolished." *Id.* at 144. "Acutely psychotic patients, suicidal patients, patients on psychotropic medication and mentally retarded prisoners [were] housed in the most restrictive cellhouse . . . along with prisoners in administrative and punitive segregation who are being punished for disciplinary violations." *Id.* at 145. In this cellhouse, "prisoners are locked in their cells for more than 22 hours a day," *id.* at 138; in "small cells that [were] filthy, inadequately lighted, improperly ventilated and infested with vermin and rodents." *Id.* at 145. Rather than remedying these prisoners' conditions, "[s]uch restrictive confinement cause[d] irreparable disabilities." *Id.* Conditions were so horrible that the defendants did not even "attempt[] to defend by asserting that plaintiffs' constitutional rights have not been violated," but instead argued "that Colorado has made substantial and good faith efforts to resolve" the unsafe conditions. *Id.* at 167.

move about within the prison or jail; several were forced to ambulate on the stumps of their knees or even to crawl.[5]

By any measure, the suffering endured by inmates with disabilities is reaching crisis proportions. A recent class action in California is but one illustration of State-wide systemic and unconstitutional abuse of prisoners with mental disabilities.[6] As explained in *Coleman* v. *Wilson*, 912 F. Supp. 1282, 1305-23 (E.D. Cal. 1995), California failed to: screen inmates for basic needs; maintain basic medical records and medication policies; maintain adequate and competent staffing; appropriately use mechanical restraints; and prevent inappropriate disciplinary and behavior control measures on prisoners

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[5] *See Bradley* v. *Puckett*, 157 F.3d 1022, 1025 (5th Cir. 1998) (Mississippi prisoner with leg brace stated claim by alleging he was denied shower chair, leaving him "unable to bathe for several months . . . [and] he was therefore forced to clean himself using toilet water . . . result[ing] in a fungal infection"); *Schmidt* v. *Odell*, 64 F. Supp. 2d 1014, 1018, 1021 (D. Kan. 1999) (prisoner with double amputation denied wheelchair was forced to "ambulate[] through the jail on his knees" and to "crawl [through] the jail parking lot"); *Kaufman* v. *Carter*, 952 F. Supp. 520 (W.D. Mich. 1996) (prisoner with bilateral amputation unable to use shower, toilet, drinking fountain, or sink).

[6] California is not alone in unconstitutionally discriminating against persons with disabilities in state-run institutions. *See* Council of State Governments, *Criminal Justice/Mental Health Consensus Project* (June 2002), at http://consensusproject.org; Human Rights Watch, *Ill-Equipped: U.S. Prisons and Offenders with Mental Illness* ch. III (Oct. 2003), at http://www.hrw.org/reports/2003/usa1003/. Once incarcerated, inmates with disabilities are more likely to be victimized, exploited, and injured than are other inmates. *See, e.g., Ruiz* v. *Estelle*, 503 F. Supp. 1265, 1344 (S.D. Tex. 1980), *aff'd in relevant part*, 679 F.2d 1115 (5th Cir. 1982).

with mental disabilities, including use of isolation and taser guns. *Ibid.*[7] To ensure an effective remedy for well-documented state discrimination against prisoners with disabilities, Congress abrogated Eleventh Amendment immunity in ADA Title II.

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[7] *See also Bradley* v. *Puckett*, 157 F.3d at 1025-26 (failure for several months to provide means to bathe led to infection); *Beckford* v. *Irvin*, 49 F. Supp. 2d 170, 180 (W.D.N.Y. 1999) (plaintiff "was regularly deprived use of his wheelchair for extended periods of time [and] . . . was unable to shower"); *Candelaria* v. *Coughlin*, 787 F. Supp. 368, 374 (S.D.N.Y. 1994) (prisoner with paraplegia was transferred to a prison without adequate facilities for no reason and while there was denied catheter and had to rely on other inmates to help him use the standard toilet; while on a trip to the State hospital, he fell out of his wheelchair and was left on the floor of a holding pen for several hours); *Yarbagh* v. *Roach*, 736 F. Supp. 318, 320 (D.D.C. 1990) (prisoner with multiple sclerosis was incarcerated for more than a year before he was seen by a physician and did not receive assistance in daily activities; as a consequence, he had not showered in more than a year and had fallen repeatedly when attempting to move from his wheelchair to his bed); *Ruiz*, 503 F. Supp. at 1274-1391 (126-page opinion describing Texas' unconstitutional treatment of prisoners with disabilities, including routinely denying prescribed treatments for prisoners who use asthmatic inhalers and wheelchairs; systematic refusal to provide individualized treatment to inmates, regardless of their type of disability; failure to maintain medical records; failure to screen inmates for psychiatric care; segregation of inmates with acute psychological disorders; and disciplining prisoners with mental retardation for infractions of rules they did not understand).

2. State Interference with Other Aspects of the Administration of Justice.

a. States Exclude People with Disabilities as Litigants.

States historically denied persons with disabilities an equal opportunity to litigate. Such discrimination has taken various forms: from the lack of interpreters or other necessities for effective communication, to the imposition of architectural barriers that exclude persons with mobility or sensory impairments from using the court system. Due process principles are violated when people with disabilities are unable effectively to access the judicial system, either in the civil or the criminal context. *See, e.g., Lane*, 541 U.S. at 523 (Due Process Clause protects "the right of access to the courts" for both civil litigants and for criminal defendants).

For criminal defendants, due process guarantees that the "accused has a right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings." *Faretta* v. *California*, 422 U.S. 806, 820 n.15 (1975). As *Lane* illustrated, however, state criminal justice systems have perpetuated barriers that exclude persons with disabilities from participating in judicial and related administrative proceedings, even when their own liberty is at stake. In *People* v. *Rivera*, 480 N.Y.S.2d 426 (Sup. Ct. 1984), a pre-ADA case that constitutes part of the history of discrimination supporting Congress' determination to regulate, the court held that a criminal defendant with hearing impairment who had been twice convicted without the assistance of a qualified sign-language interpreter had been deprived of his constitutional rights. As an accommodation in one of his criminal trials, the court provided a Spanish interpreter, despite the fact that the defendant could not "read, write or lip-read in either English or Spanish," and in fact was

"so severely hearing impaired that he is and has been . . . incapable of adequately expressing himself without the aid of qualified [sign-language] interpreters." *Id.* at 430. Although the Spanish interpreter attempted in good faith to translate, "the conclusion [was] inescapable that [the defendant] did not adequately comprehend or participate in the . . . trial at which he was convicted." *Id.* at 431. Additionally, the defendant believed that he was "obligated to take the stand . . . on pain of going to jail." *Id.* at 434. At the second trial, "it was conceded that no interpreter was present." *Id.* at 431. The court concluded that the defendant had been denied the effective assistance of counsel in violation of the Sixth Amendment, forced to testify in violation of the Fifth Amendment, and that his conviction was unconstitutionally obtained in violation of the Fourteenth Amendment. *Id.* at 434.

Similar abuses persisted even after Congress enacted the ADA. In *Armstrong* v. *Davis*, 275 F.3d 849 (9th Cir. 2001), *cert. denied*, 537 U.S. 812 (2002), for example, California failed to provide prisoners with disabilities adequate access to, and a meaningful opportunity to participate in, parole hearings. The process depended "to a great extent" on written forms; prisoners and parolees with disabilities were "provided with inadequate accommodations to help them understand the contents of those forms, and as a consequence some plaintiffs waived their rights to a hearing and others failed to invoke their rights on appeal." *Id.* at 857 (footnote omitted). The system did not provide American Sign Language interpretation services, Braille copies of documents, qualified readers, or staff capable of effectively communicating with prisoners and parolees with mental disabilities or mental illnesses. *Id.* at 858 n.10. Affirming on ADA grounds, the Ninth Circuit held that the "minimal due process measures taken [by the defendant parole board] were insufficient to comply with

the ADA or to enable plaintiffs properly to invoke or assert their rights." *Id.* at 862. Furthermore, there was no reasonable relation to any legitimate penal interest that could justify the impingement on the prisoners' and parolees' constitutional rights. *Id.* at 873-74.

b. States Have Excluded People with Disabilities as Jurors.

When Congress passed the ADA, it was relatively common for State courts categorically to exclude persons with certain disabilities from serving on juries. *See Lane*, 541 U.S. at 525 & n.9 (citing statutes disqualifying persons who are "infirm," "decrepit," or "mentally and physically disabled"). New York, for example, barred persons with disabilities from serving on juries for more than 150 years. *See Lewinson* v. *Crews*, 282 N.Y.S.2d 83, 87-88 (App. Div. 1967) (Hopkins, J., dissenting) (noting that law excluding blind jurors had been in place since 1829); *People* v. *Guzman*, 555 N.E.2d 259, 261 (N.Y. 1990) (noting that New York state courts ceased excluding people with disabilities only after passage of ADA). New York was far from an anomaly.[8]

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[8] States with discriminatory jury service laws in place at the time of the passage of the ADA include Arkansas, Ark. Code Ann. §16-31-102 (1987), *amended* 1994 Ark. Acts No. 4, §6 (1994) (barring those with "substantial impairments" to hearing or sight from jury service); the District of Colombia, *Galloway v. Superior Court*, 816 F. Supp. 12, 16-17 (D.D.C. 1993) (the "conclusion that blind jurors are not qualified appears based on exactly the archaic attitudes and unsubstantiated prejudices Congress wished to eradicate" in passing the ADA); Missouri, *State* v. *Spivey*, 700 S.W.2d 812, 813-14 (Mo. 1985) (permitting the exclusion of "deaf, mute, deaf-mute, and blind persons, from inclusion in the jury pool" on the grounds that they did not have "a community of attitudes or ideas"); and Pennsylvania, *DeLong* v. *Brumbaugh*, 703 F. Supp. 399, 406 (W.D. Pa. 1989) (Superior

Of course, these laws were on the books almost two decades after this Court held that "the State may no more extend it [jury service] to some of its citizens and deny it to others . . . than it may invidiously discriminate in the offering . . . of the elective franchise." *Carter* v. *Jury Comm'n*, 396 U.S. 320, 330 (1970). There is no compelling interest in, nor any rational basis for, excluding people with physical and mental disabilities from jury service without regard to their individual ability to function as jurors. Nevertheless, in 1984, county officials in Alabama "conceded that Shelby County is not equipped to accommodate jurors who have severe physical disabilities, and that the Shelby County courts routinely excuse such persons from jury service, as do all of the State's courts." *Hill* v. *Shelby County*, 599 F. Supp. 303, 304 (N.D. Ala. 1984).

B. Patterns of Unconstitutional State Interference with Constitutional Rights in Contexts other than the Administration of Justice.

The historical record that informed enactment of the ADA was not limited to the system of justice. Accordingly, unconstitutional State mistreatment of persons with disabilities in other contexts provides additional illumination of Congressional intent to abrogate state immunity.

1. State Treatment of Institutionalized Persons with Disabilities.

Singling out persons with disabilities for unnecessary institutionalization is a form of

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Court judge testified "he would disqualify a deaf person under all circumstances").

discrimination. *Olmstead* v. *L.C. ex rel. Zimring* 527 U.S. 581, 600 (1999), and *id.* at 613-14 (Kennedy, J., concurring); *see also Lane*, 541 U.S. at 524-25 (the court has "identified unconstitutional treatment of disabled persons by state agencies in a variety of settings, including unjustified commitment . . . [and] the abuse and neglect of persons committed to state mental health hospitals"). State discrimination of this sort violates the due process rights of persons in civil institutions articulated in *Youngberg* v. *Romeo*, 457 U.S. 307, 315-19 (1982): safe conditions, freedom from unnecessary bodily restraints, and the training necessary to assist them in securing those rights. *Lane* noted particular examples of patients in state mental health hospitals being physically abused and drugged. 541 U.S. at 524 n.10. Despite *Youngberg* and the ADA, States have resisted ameliorating the unconstitutional conditions in their civil institutions.

A case brought by a class of children with mental retardation, emotional disturbance, and physical disabilities against the State of Louisiana exemplifies a State's persistent unconstitutional behavior. In 1976, the plaintiffs established physical abuse, neglect, and unnecessary restraint of its wards, and the judge ordered remedial action. *Gary W.* v. *Louisiana*, 437 F. Supp. 1209, 1219, 1213 (E.D. La. 1976). In 1990, twenty-five years later, and notwithstanding the judge's efforts "to facilitate, cajole, and even coerce compliance," the State institutions were still unable to prevent outright abuse of patients, or to provide minimally adequate treatment, consistent with constitutional standards. *Gary W.* v. *Louisiana*, No. 74-2412, 1990 U.S. Dist. LEXIS 1746, at *81 (E.D. La. Feb. 15, 1990).

Many other state-run institutions also continue to deprive persons with disabilities of liberty and dignity, while exposing residents to dangerous conditions. For example, a federal judge described Alabama's institutions

as "essentially warehousing patients in an inhumane environment." *Wyatt ex rel. Rawlins* v. *Rogers*, 985 F. Supp. 1356, 1361-62 (M.D. Ala. 1997). These conditions existed even after Alabama entered into a consent decree to improve the state's record on institutionalization. The institutions were the subjects of similar findings as early as 1971 for "grossly substandard" instances including examples of residents being scalded to death and restrained in a straightjacket for nine years, among others. *Wyatt* v. *Stickney*, 344 F. Supp. 387, 391 (M.D. Ala. 1972), *aff'd in relevant part*, 503 F.2d 1305 (5th Cir. 1974). By 1991, a court-appointed expert concluded that "there remain[ ] significant problems and noncompliance . . . most significantly, unnecessary institutionalization." 985 F. Supp. at 1367.

The same year in which Congress passed Title II of the ADA, children at a New York facility for people with mental retardation were regularly left unclothed and unattended in their own bodily wastes on cold floors while the staff watched television. *Society for Good Will to Retarded Children* v. *Cuomo*, 745 F. Supp. 879, 879 (E.D.N.Y. 1990). The federal court described New York's Long Island Development Center in grim terms (*id.* at 879):

> "[V]isits by the court to the Center revealed a deplorable situation. Clients lay half-naked and unattended in their own urine and feces on cold floors in dismal surroundings while untrained attendants watched television. The facility's inadequate professional personnel failed to provide suitable training or educational programs for residents. Entry into the institution often led to swift physical and emotional deterioration and loss of skills. The huge population of some fifteen

> hundred clients made effective management and control impossible."

Similarly, Kentucky's Outwood Institution has been described as "atrocious." *Kentucky Ass'n for Retarded Citizens* v. *Conn*, 510 F. Supp. 1233, 1237 (W.D. Ky. 1980), *aff'd*, 674 F.2d 582 (6th Cir. 1982), *supplemental op.*, 718 F.2d 182 (6th Cir. 1983).

In addition to mistreating people with disabilities while they are in institutions, the States have a long history of institutionalizing people unnecessarily. *See, e.g. Clark* v. *Cohen*, 794 F.2d 79, 85-87 (3d Cir. 1986) (documenting ten-year effort to secure the release of a woman with mild retardation who had been institutionalized for 40 years; even after repeal of commitment statute and after doctors recommended her release, State officials did not review her case). In the decade before Congress enacted Title II, several States still allowed commitment of people with "grave[] disab[ilities]" without considering the alternative of care by the individual's family or other State programs.[9] Congress was fully aware of such unnecessary and unconstitutional civil commitment practices when it passed the ADA. *See* United States Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities* 29, 34 (1983).

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[9] *See, e.g.*, Colo. Rev. Stat. Ann. §§17-176, 177 (West. Supp. 1985); Conn. Gen. Stat. Ann. §171-178(c) (West. Supp. 1985); Fla. Stat. Ann. §394.467(1)(B)(I) (Supp. 1985); Ill. Comp. Stat. Ann. Ch. 911/2 1-119(2) Smith-Hurd Supp. 1985); N.J. Stat. Ann. §§30:4-44, 30:4-45 (West 1977); N.Y. Mental Hyg. Law §9.32 (McKinney 1978 & Supp. 1985); Vt. Stat. Ann. tit. 18, §7101(17)(B)(ii) (Supp. 1985).

2. State Interference with the Right to Vote.

When it passed the ADA, Congress found persistent discrimination in the "critical" area of "voting." *See* 42 U.S.C. §12101(a)(3). The fundamental right to vote is "preservative of other basic civil and political rights." *Reynolds* v. *Sims*, 377 U.S. 533, 562 (1964).

Despite the rule that classifications infringing the ability to exercise the right to vote must be examined with strict scrutiny, *Harper* v. *Virginia State Bd. Of Elections*, 383 U.S. 663, 666 (1966), States historically prevented Americans with disabilities from exercising that right through a host of laws. *See, e.g., City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 464 (1985) (Marshall, J., concurring in part and dissenting in part) (citing 1979 article finding that "most States still categorically disqualified 'idiots' from voting"). These laws, facially or as applied, categorically excluded people with disabilities from voting, without reference to individual competence. *See Manhattan State Citizen's Group Inc.* v. *Bass*, 524 F. Supp. 1270 (S.D.N.Y. 1981) (New York statute prohibiting individuals involuntarily committed to mental institution from voting was unconstitutional as applied). As the Court recently observed "[t]he majority of these laws remain on the books." *Lane*, 541 U.S. at 524 nn.6,13 (noting both the "categorical [disqualifi[cation]" of those deemed "idiots" from voting, and the inability to access polling places by voters with impaired mobility).

Additionally, States denied individuals with disabilities physical access to both polling places and voting machines. In *Hill* v. *New York State Bd. of Elections*, 503 N.Y.S.2d 958 (Sup. Ct. 1986), for example, the court noted that the New York State elections board permitted local entities to position polling places in sites inaccessible to people with disabilities.

Discrimination is pervasive and ongoing. Even studies within the past decade have concluded that, in some states, a significant portion of voting sites were inaccessible to voters with physical disabilities. Confronted with evidence that in two New York counties, all polling places but one were inaccessible to persons with disabilities, a federal court ordered access pursuant to the ADA. *New York* v. *County of Schoharie*, 82 F. Supp. 2d 19 (N.D.N.Y. 2000); *New York* v. *County of Delaware*, 82 F. Supp. 2d 12 (N.D.N.Y. 2000).[10]

Because the States' categorical disenfranchisement of persons with disabilities and interference with such persons' rights to vote are themselves unconstitutional, the reasonable accommodation requirements of Title II represent a congruent and proportional legislative response in such circumstances.

3. State Interference with the Rights to Marry and to Form Families.

States also have interfered with the rights of persons with disabilities to marry, one of the "basic civil rights," without the requisite showing of a compelling interest. *Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1942); *see also Zablocki* v. *Redhail*, 434 U.S. 374, 381 (1978).

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[10] *See also* Voting Rights Primary Access Committee, *Exercising My Right to Vote: The Accessibility of New Hampshire Polling Places to Citizens with Disabilities* (Apr. 1996) (in 1996, 59% of New Hampshire's polling places physically inaccessible); Coalition for Accessible Political Elections, *Report of the National Voter Independence Project* (Feb. 1999) (nationwide survey showed that 47% of polling places lacked accessible path to voting area, and 52% of polling places lacked a booth large enough to accommodate a wheelchair); Debra Auspitz, *Disabled Votes*, PHILADELPHIA CITY PAPER, Mar. 9-16, 2000 (survey found that only 27% of Philadelphia polling places were accessible).

Numerous States categorically restricted the rights of persons with disabilities to marry, without any determination of individual capacity, in a manner that cannot withstand strict scrutiny. Many States maintained such restrictive statutes when the ADA was enacted.[11] Some of these statutes remain on the books. *See* Tenn. Code Ann. §36-3-109 (2001) (forbidding issuance of a marriage license "when it appears" that an applicant may be "insane or an imbecile"); D.C. Code Ann. §46-403 (2001) (marriage of "an idiot or of a person adjudged to be a lunatic" is illegal and void); *cf.* Utah Code Ann. §30-1-2(1) (1987) (marriage of person infected with AIDS is "prohibited" and "void") (declared void and invalid in *T.E.P.* v. *Leavitt*, 840 F. Supp. 110, 111 (D. Utah 1993)). *Lane* observed that States continue to engage in "systematic deprivations of fundamental rights," including maintaining statutes that criminalize or declare void and illegal the marriages of persons with mental disabilities. 541 U.S. at 524.

The States also share a long pattern of depriving Americans with disabilities of the right and ability to procreate.[12] When Congress enacted the ADA, some

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[11] *See Lane*, 541 U.S. at 524 & n.8; Bruce Dennis Sales, *et al.*, DISABLED PERSONS AND THE LAW: STATE LEGISLATIVE ISSUES 16-20 (Plenum Press 1982) (as of 1980, forty-two States and the District of Columbia had statutes restricting marriage for persons with disabilities). *See also* Cal. Civ. Code §4201 (1987); D.C.Code Ann. §30-103 (1981); Iowa Code Ann. §595.3 (1990); Mich. Com. Laws §551.6 (1988); Miss. Code Ann. §41-21-45 (1990); Pa. Stat. Ann. tit. 48, §1-5 (West 1990); R.I. Gen. Laws §15-1-5 (1988); Vt. Stat. Ann. tit. 15, §514 (1989); W. Va. Code §48-2-2 (1990).

[12] The right to procreate is a fundamental right that is "free from unwarranted governmental intrusion." *Eisenstadt* v. *Baird*, 405 U.S. 438, 453 (1972). Limitations of this fundamental right are subject to heightened scrutiny. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-86 (1977).

states still had laws authorizing involuntary sterilization of persons with disabilities. *See Cook* v. *State*, 495 P.2d 768 (Or. 1972) (upholding state statute mandating sterilization). In 1981, former patients of Virginia institutions who were involuntarily sterilized under a 1924 statute articulated a continuing constitutional violation, based on the State's continuing failure to notify them that they had been sterilized – causing them to suffer "medical, emotional, and mental problems, arising in large part from unsuccessful and uninformed attempts to deal with their infertility." *Poe* v. *Lynchburg Training Sch. & Hosp.*, 518 F. Supp. 789, 793 (W.D. Va. 1981). Many state courts continued to uphold these statutes. *See, e.g., In re Sterilization of Moore*, 221 S.E.2d 307 (N.C. 1976); *Cook* v. *State*, 495 P.2d 768 (Or. 1972). And even after compulsory sterilization laws were repealed, some States enacted statutes that allowed sterilization on the consent of a superintendent of a custodial care institution or a guardian.[13] Contemporaneous commentators, in contrast, had concluded that "compulsory sterilization laws, no matter what their rationale, [we]re unconstitutional in the absence of evidence that compulsory sterilization [was] the only remedy available to further a compelling governmental interest." *In re A.W.*, 637 P.2d 366, 368-69 (Colo. 1981) (*citing* Burgdorf & Burgdorf, *The Wicked Witch Is Almost Dead: Buck* v. *Bell and the Sterilization of Handicapped Persons*, 50 Temp. L.Q. 955 (1977)).

With respect to people with disabilities who bear children, States have interfered with the constitutional right to raise those children. This Court has repeatedly "recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel* v. *Granville*, 530 U.S. 57, 66 (2000).

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[13] Price & Burt, *Sterilization, State Action and the Concept of Consent*, 1 Law & Psych. Rev. 57 (1978).

Yet, in matters involving the parent-child relationship, States have historically treated parents with mental or physical disabilities quite differently from other parents. This discrimination often relies on unjustified stereotypes, rather than actual individual differences in capacity. In *Bednarski* v. *Bednarski*, 366 N.W.2d 69, 73 (Mich. Ct. App. 1985), a Michigan trial court terminated a deaf woman's custody of her "[t]wo normal children," citing her deafness, a holding the appellate court reversed. In another case a California appellate court condemned the trial court's conclusion that a father was "deemed forever unable to be a good parent simply because he is physically handicapped" and observed that, "[l]ike most stereotypes, this is both false and demeaning." *In re Marriage of Carney*, 598 P.2d 36, 42 (Cal. 1979). *See also In re Marriage of R.R.*, 575 S.W.2d 766, 768 (Mo. Ct. App. 1978) (reversing custody order that had been based on unsubstantiated fear that the children would be "emotionally damaged because of [the father's] handicap"); *In re Adoption of Richardson*, 59 Cal. Rptr. 323, 329-30 (Ct. App. 1967) (reversing trial court's refusal to allow a deaf couple to adopt a child "solely because they were deaf-mutes").

4. State Discrimination in the Provision of Education.

"[E]ducation is perhaps the most important function of state and local governments." *Brown* v. *Board of Educ.*, 347 U.S. 483, 493 (1954). The categorical exclusion of any class of children from the educational system poses serious equal protection concerns. *See Plyler v. Doe*, 457 U.S. 202, 221-22 (1982) ("denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause"). States nevertheless have historically discriminated against people with disabilities by excluding them from educational opportunities. *See Lane*, 541 U.S. at 524 & n.

12 (citing examples of the segregation and exclusion of children with physical and mental disabilities from schools). Prior to the ADA, a number of States categorically excluded children with disabilities from public education. *See, e.g.*, Del. Const. art. 10, §1 (1975) (establishing free public schools for all children *except* those who were "physically or mentally disabled"). When Congress enacted the Education for All Handicapped Children Act (EAHCA) in 1975, it compiled an extensive record that States simply did not educate children with disabilities. Based on this record, Congress found that one million children were "excluded entirely" from the public school system, and "more than one-half" of the 8 million children with disabilities did not receive appropriate educational services. 20 U.S.C. §1400(c)(2).

Contemporaneous judicial decisions confirm Congress' conclusion. In *Pennsylvania Ass'n for Retarded* v. *Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972), The court found that plaintiffs who challenged Pennsylvania statutes excluding them from school had articulated equal protection and due process claims under the rational basis test. *See also Honig* v. *Doe*, 484 U.S. 305, 310 (1988) ("by the time of the EHA's enactment, parents had brought legal challenges to similar exclusionary practices in 27 other States"); *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972) (due process violation when defendant excluded students with disabilities from public education); *Panitch* v. *Wisconsin*, 444 F. Supp. 320 (E.D. Wis. 1977) (even after passage of EAHCA, Wisconsin excluded students with disabilities from educational opportunities). In passing the ADA, Congress relied upon a Civil Rights Commission Report finding that "a great many handicapped children continue[d] to be excluded from the public schools" after the EAHCA.[14] Congress

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[14] United States Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities* 29 (1983).

therefore found that States were still discriminating against children with disabilities in the "critical area" of "education." 42 U.S.C. §12101(a)(3). Instances of unconstitutional State exclusion still persist. *See, e.g., Robinson* v. *Kansas*, 117 F. Supp. 2d 1124 (D. Kan. 2000), *aff'd*, 295 F.3d 1183 (10th Cir. 2002) (students with disabilities stated actionable due process and equal protection claims alleging inadequate school funding).

In short, Congress' specific findings, the well-established judicial history, and the legislative history all provide extensive and compelling evidence that States participated in and perpetrated a pattern of unconstitutional discrimination, including their treatment of prisoners with disabilities. This historical record amply supports Congress' abrogation of the Eleventh Amendment for Title II of the ADA.

CONCLUSION

The judgment should be reversed.

Respectfully submitted.

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THE AMICI ORGANIZATIONS

Paralyzed Veterans of America ("PVA") is a congressionally chartered veterans' service organization founded in 1946 with more than 20,000 members, all of whom are veterans of the armed forces with spinal cord injury or dysfunction. PVA has developed a unique expertise on a wide variety of issues involving the special needs of its members and uses that expertise to be the leading advocate for civil rights and opportunities which maximize the independence of its members. Virtually all PVA members use wheelchairs for mobility and have a significant interest in the broadest possible implementation and enforcement of the Americans with Disabilities Act of 1990.

Easter Seals has been providing services that help individuals with disabilities and special needs, and their families, live better lives for more than 80 years. Easter Seals promotes the passage and enforcement of federal legislation, including the ADA, that enables people with disabilities to achieve greater independence. Its primary services—medical rehabilitation, job training and employment, inclusive child care, adult day services, and camping and recreation—benefit more than 1 million individuals and their families each year through one of 450 centers nationwide.

The **American Association of Retired Persons ("AARP")** is a nonprofit, nonpartisan membership organization with more than thirty-five million persons age 50 and older that is dedicated to addressing the needs and interests of older Americans. Countless AARP members with disabilities rely on Title II of the ADA to assure access to public programs and services, including those provided by states and state entities, in a manner free from discrimination. These protections are especially important to AARP members because older persons have a higher incidence of disabilities than other populations.

The **American Association of People with Disabilities (AAPD)** is a national nonprofit, non-partisan membership organization whose mission is to promote the political and economic power of children and adults with disabilities in the United States. Founded on the fifth anniversary of the Americans with Disabilities Act (ADA), AAPD has a strong interest in full and effective enforcement and implementation of that landmark law. With more than 115,000 members, AAPD is the largest cross-disability membership organization in the United States.

The **Epilepsy Foundation** is the sole national, charitable voluntary health organization dedicated to advancing the interests of the more than 2.5 million people with epilepsy and seizure disorders. The term "epilepsy" evokes stereotyped images and fears in others that affect persons with this medical condition in all aspects of life, including the delivery of public services and participation in public programs. Since its inception, the Foundation has worked to dispel the stigma associated with seizures and has supported the development of laws, such as the ADA, that protect individuals from discrimination based on these stereotypes and fears.

The **National Federation of the Blind (NFB)** is the leading national organization of blind persons, with affiliates in all 50 states, the District of Columbia and Puerto Rico. Most of its approximately 50,000 members are blind. NFB is recognized by the public, Congress, governmental agencies, and the courts as a collective and representative voice of blind Americans and their families. NFB promotes the general welfare of the blind by (1) assisting the blind to integrate themselves into society on terms of equality and (2) removing barriers and changing social attitudes, stereotypes and mistaken beliefs concerning blindness that are held by sighted and

blind persons and that result in the denial of opportunity to blind persons in virtually every sphere of life.

The **Polio Society** serves its nationwide membership with information and referral services, training in self-advocacy to enforce the civil rights of persons with disabilities, and support for legislation of benefit to polio survivors and the disability community at large. The ADA is a key element of the Polio Society's advocacy. The members are persons with disabilities as a result of polio and post-polio syndrome.

The **Association on Higher Education and Disability ("AHEAD")** is a non-profit organization committed to full participation in higher education and equal access to all opportunities for persons with disabilities, including public services, professional licensing and employment, among other state activities. Its membership includes approximately 2,000 institutions including colleges, universities, and not-for-profit service providers, professionals, and college and graduate students planning to enter the field of disability practice. Many of its members are actively engaged in assuring ADA compliance and in providing reasonable accommodations to both students and employees at institutions of higher education and in high-stakes standardized testing. AHEAD publishes numerous resources on the implementation of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973 by post-secondary educational institutions.

United Cerebral Palsy Associations, Inc. is one of the oldest and largest national health organizations dedicated to improving the lives of people with disabilities. Founded in 1949, the organization advances the independence, productivity and full citizenship of people with disabilities through a nationwide network of approximately 100 affiliates in 37 States and the District of Columbia. United Cerebral

Palsy was one of the major leaders in supporting enactment of the Americans with Disabilities Act.

The **National Lawyers Guild**, founded in 1937 as an alternative to the then-racially segregated American Bar Association, is a national non-profit legal and political organization dedicated to using the law as an instrument for social amelioration. Through its members – lawyers, law students, jailhouse lawyers and legal workers united in chapters and committees – the Guild works locally, nationally and internationally as an effective political and social force in the service of the people. The central aims of the Guild include safeguarding and strengthening the rights of minority and oppressed groups, including people with disabilities; maintaining and protecting civil and human rights and liberties in the face of persistent attacks; and using the law as an instrument for the protection of the people, rather than for their repression.

The **National Council on Independent Living ("NCIL")** is the oldest cross-disability, national grassroots organization run by and for people with disabilities. NCIL's membership is comprised of centers for independent living, statewide independent living councils, people with disabilities and other disability rights organizations. NCIL's mission is to advance the independent living philosophy and to advocate for the human rights of, and services for, people with disabilities to further their full integration and participation in society.

The **National Mental Health Consumers' Self-Help Clearinghouse** is a national technical assistance center established in 1986. It is run by and for people who are consumers of mental health services and survivors of psychiatric illness (known as consumers/survivors). Its mission is to promote consumer/survivor participation in planning, providing and evaluating mental health and community support

services, to provide technical assistance and information to consumers/survivors interested in developing self-help services, and advocating to make traditional services more consumer/survivor-oriented. The Clearinghouse has an interest in helping people with mental illness live to their full potential as active members of the community.

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No. 04-1236 (15)

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

STATE OF GEORGIA, *et al.*,

Respondents.

TONY GOODMAN,

Petitioner,

v.

STATE OF GEORGIA, *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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QUESTION PRESENTED

Whether Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131 to 12165, validly abrogates state sovereign immunity for suits for damages by inmates alleging disability-based discrimination by state prison officials.

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STATEMENT

This case asks whether Congress validly abrogated the States' Eleventh Amendment immunity in Title II of the Americans With Disabilities Act of 1990 (the "ADA"), 104 Stat. 337, 42 U.S.C. §§ 12131-12165, as applied to suits for damages brought by disabled state-prison inmates. More specifically, it presents the question whether *Tennessee v. Lane*, 541 U.S. 509 (2004), which held that Congress, in enacting Title II of the ADA, validly abrogated state sovereign immunity "as applie[d] to the class of cases implicating the accessibility of judicial services," *id.* at 531, extends to state prison inmates who challenge the actions and omissions of state prison administrators.

As this Court's decisions in *City of Boerne v. Flores*, 521 U.S. 507 (1997), and its progeny have demonstrated, one of the few limitations imposed by the United States Constitution on such otherwise-sensible measures as the ADA arises where one sovereign attempts to impose a money-damages remedy on another sovereign. No State could impose such an obligation upon the federal government, or upon another State. In our government of "dual sovereigns," *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991), the Eleventh Amendment similarly cabins (though it does not absolutely forbid) the power of Congress to pass laws that seek to give citizens the ability to sue an unconsenting state for damages. *See, e.g., Board of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001).

A State's Eleventh Amendment immunity may be abrogated only when Congress expresses its intent to do so, *and* properly acts pursuant to a constitutional provision granting it the right to abrogate. Section 5 of the Fourteenth Amendment, also known as the Enforcement Clause, provides the primary avenue through which Congress can abrogate a state's Eleventh Amendment immunity. *See Seminole Tribe v. Florida*, 517 U.S. 44, 59-66 (1996). Under § 5, Congress may enact legislation allowing private

individuals to sue the States for damages only if such legislation is limited to the purpose of "enforcing, by appropriate legislation" the substantive guarantees of the Fourteenth Amendment. *City of Boerne*, 521 U.S. at 517-18; *Lane*, 541 U.S. at 554 (Scalia, J., dissenting). That, in turn, requires the Court to determine what constitutional guarantee required remediation, whether Congress was in fact responding to a widespread and intractable problem of unconstitutional state discrimination, and if so, whether Congress's chosen remedy was proportional and congruent to these constitutional violations.

The resolution of each of these questions should lead the Court to conclude that Congress did not validly abrogate state Eleventh Amendment immunity as applied to the class of cases where disabled state inmates seek money damages for denial of access to "services, programs, or activities." *See* 42 U.S.C. § 12132. Accordingly, the Court of Appeals' judgment should be affirmed.

Briefly stated, the facts of this case are as follows:

1. Petitioner Tony Goodman, a paraplegic with a prior felony conviction, returned to a state prison in 1995 after being convicted of aggravated assault, possession of cocaine with intent to distribute, and possession of a firearm by a convicted felon. Goodman had a domestic dispute with his live-in girlfriend outside their home, and he shot at her with a gun. *Goodman v. State*, 237 Ga. App. 795, 516 S.E.2d 824 (1999). When the shot missed, the woman ran inside and called 911. According to trial testimony, the gun jammed and Goodman chased her down, got out of his wheelchair, and beat her with the gun. When police arrived, they found a fight in progress. The woman was cut and bruised and "her blood was splattered on the wall." *Id.*, 516 S.E.2d at 825. Police officers then found 22 pieces of crack cocaine. *Id.* at 795-96, 516 S.E.2d at 825. Goodman claimed at trial that he did not know where the drugs had come from, but "theorized that [his brother and girlfriend] were having an affair and

that they placed the gun and cocaine on him in an elaborate scheme to frame him." *Id.* at 796, 516 S.E.2d at 826. The jury convicted Goodman and he was sentenced to a term of years in the Georgia state prison system.

2. Goodman, who has filed more than 60 lawsuits since his incarceration in the Georgia State Prison (*see* Br. in Opp. to Cert. 1-2 n.1), filed this civil action in federal district court in January 1999. J.A. 27.

a. Goodman's *pro se* complaint alleged a variety of wrongs, ranging from the temperature in his cell in the Georgia State Prison (J.A. 38) to the lighting in the facility. J.A. 48. Relevant to the question before this Court are the following claims and allegations:

—That the Department of Corrections violated his ADA rights when they transferred him from a "medical prison" to Georgia State Prison and denied or excluded him from participation in Mental Health/Mental Retardation programs and activities. J.A. 34.

—That he is entitled to relief for "his continued confinement in segregated environment, on the grounds of unlawful disability-based discrimination. Defendants have confined Plaintiff to [the Georgia State Prison] where that Plaintiff could be appropriately treated in more integrated community setting." Goodman added that "the failure to provide the most integrated services appropriate to the needs of disabled persons constitutes unlawful disability-based discrimination. Here the Defendants has [*sic*] violated the core principle underlying the A.D.A.'s integration mandate." J.A. 35.

—That the unit he lived in "lacks facilities for the disabled 'for hygiene, drinking and performing body excretion functions.'" J.A. 39.

—That he was given no assistance by staff in using the toilet and getting to his bed and has thus suffered injuries. J.A. 39.

—That he was kept "in a very small cell (12 feet long and 3-feet wide) which he can not [turn] his wheelchair around in side of this cell." J.A. 38-39.

—That he has "been forced to sit in his own waste, denied of catheter, denied of rehabilitative exercises, denied of assistance in being transferred from his w/c [*sic*], to the bed all of which resulted, among other things, in the Plaintiff not getting a bath or a shower for (10) months." J.A. 43.

—That he could not access the prison law library. J.A. 41-42.

b. In other papers, which the Court of Appeals also considered, Goodman alleged that he was injured in transferring to or from his toilet. He says he fell and broke his right toe and crushed his right knee on five different occasions between August 1998 and April 1999. J.A. 55. He alleges that within one month between mid-March and mid-April 1999, he broke the same toe and crushed the same knee three times from toilet-transfer falls. J.A. 55. He also claims that, on August 26, 1998, the toilet seat in his cell was not stable, and so he fell when he "hurl[ed]" himself onto the toilet, in turn causing an epileptic seizure. J.A. 55. He alleges he once defecated and urinated on himself and, when he requested cleaning supplies and assistance from staff members, they refused. J.A. 65.

c. Finally, in his Statement of Undisputed Facts in support of his motions for Summary Judgment, Goodman alleged he had been denied certain "Privileges and Rights" granted to other inmates at his security level, including "counseling services, educational services, college program, vocational training, recreation activities, freedom of movement in the unit and institution, television, phone calls, entertainment, and religious rights, also we are being denied of medical supervision and education concerning 'diabetes and hypertension.'" J.A. 65, 83-84.

d. The State has continually denied Goodman's factual allegations (J.A. 72-73, 93-95), and has pointed out to the

courts that Goodman has at numerous times throughout this case contradicted his material factual allegations.

3. In 2001, the district court dismissed Goodman's complaint on summary judgment (Goodman Pet. App. 24a-28a), and in 2004, the Court of Appeals for the Eleventh Circuit affirmed that judgment in part, and reversed it in part. *Id.* at 1a-23a.

a. The district court granted summary judgment on Goodman's § 1983 claims against the individual defendants under the Eighth Amendment because, as the Eleventh Circuit later agreed, "Goodman's complaint was less than a model of clarity." Goodman Pet. App. 17a. The Eleventh Circuit reversed, holding that "the act of dismissal, without leave to amend, was too severe a sanction" for the complaint's deficiencies. *Id.* Thus, Goodman's Eighth Amendment claims were reinstated, on the condition that he file an Amended Complaint when the case returns to the district court. *Id.* at 17a-18a.[1]

b. The district court also granted summary judgment on Goodman's Title II ADA claims for damages, on the ground that Congress did not validly abrogate the States' Eleventh Amendment immunity in passing Title II of the ADA. Goodman Pet. App. 27a (citing *Board of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001)). The Eleventh Circuit affirmed "the magistrate judge's grant of summary judgment to all the defendants on Goodman's ADA claims for monetary damages as barred by the Eleventh Amendment." Goodman Pet. App. 19a. The Eleventh Circuit relied on its

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[1] The Eleventh Circuit also held that some of Goodman's claims "are obviously frivolous," and it thus limited him to three claims on which to build a § 1983 case for trial, if he can sufficiently amend his Complaint so as to state claims of rights violations by individual Respondents: (1) that he cannot move his wheelchair in his cell; (2) that he was forced to sit in his own waste because prison officials refused to provide assistance; and (3) that the care given to him at GSP amounts to "'deliberate indifference' to his serious medical condition of being partially paraplegic." Goodman Pet. App. 18a.

prior decision in *Miller v. King*, 384 F.3d 1248 (11th Cir. 2004), in which it had held: "A requirement of reasonable accommodations for a qualified, disabled prisoner in the prison's educational, recreational and job-training programs, for example, bears no permissible prophylactic relationship to deterring or remedying violations of disabled prisoners' right to be free from cruel and unusual punishment." *Id.* at 1275. Even while acknowledging "that § 5 authorizes Congress to deter Eighth Amendment violations by prohibiting 'a somewhat broader swath of conduct' than that prohibited by the Eighth Amendment," the court in *Miller* ultimately held that "Title II prohibits far more state conduct and in many more areas of prison administration than conceivably necessary to enforce the Eighth Amendment's ban on cruel and unusual punishment." *Id.* at 1274.

c. The Eleventh Circuit held that Goodman could proceed on his ADA Title II claim for injunctive relief. Goodman Pet. App. 19a-21a. The State has not cross-petitioned from that ruling.

4. The United States (which had intervened in the Eleventh Circuit to defend the validity of Title II's abrogation of the States' sovereign immunity) and Goodman each petitioned this Court to review the judgment of the Eleventh Circuit in this case, presenting questions regarding the validity of Congressional abrogation of sovereign immunity "as applied to the administration of prison systems" (No. 04-1203), "for suits by prisoners with disabilities challenging discrimination by state-operated prisons" (No. 04-1236). On May 16, 2005, this Court granted both petitions and consolidated the cases.

SUMMARY OF THE ARGUMENT

Title II of the ADA is not validly applied to allow state prisoners to bring suits for damages, as that title is not "appropriate legislation" under § 5 of the Fourteenth Amendment.

I. The first step in the congruence-and-proportionality inquiry prescribed by this Court's precedents is to "identify with some precision the scope of the constitutional right at issue." *Garrett*, 531 U.S. at 365. Discrimination against the class of disabled persons has always been considered by this Court as subject only to constitutional rational-basis review, *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446 (1985), and when prisons and prisoners are involved, constitutional rational-relationship review, and heightened deference to the actions of prison officials, is the norm. *Turner v. Safley*, 482 U.S. 78, 89 (1987). The claimed prisoner rights of access to services, programs, and activities would thus merit the lowest level of constitutional protection, which takes this case outside of this Court's decisions in *Tennessee v. Lane*, 541 U.S. 509 (2004) (access to courts), and *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003) (gender-based discrimination), both of which involved classifications subject to heightened constitutional scrutiny, which in turn makes it "easier for Congress to show a pattern of state constitutional violations." *Id.* at 736.

II. Because "Congress' § 5 authority is appropriately exercised only in response to state transgressions," *Garrett*, 531 U.S. at 368, the next step in the congruence-and-proportionality analysis is to determine whether Congress had a record demonstrating a "widespread and persisting" pattern of unconstitutional discrimination against disabled state prisoners with respect to the provision of programs, services, and activities. It did not. The legislative history of the ADA, in fact, was concerned primarily with integrating "persons with disabilities into the economic and social mainstream of American life," H.R. Rep. No. 101-485, Pt. 2, at 50 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 304, which is the polar opposite of the imprisoned inmate, who is by definition *removed from* society's "mainstream." *See Palmer v. Hudson*, 468 U.S. 517, 526 (1984). It is therefore not surprising that the legislative record demonstrates little

concern with inmates in state prisons; what few references to prisons and prisoners exist in the legislative record are scattered, anecdotal, or—in the case of the United States' reliance on the testimony of Cindy Miller (U.S. Br. 23)—demonstrably miscited.

Petitioners' efforts to overcome these deficiencies in the legislative record with a cataloging of judicial decisions also fail. Over two-thirds of the cases Petitioners cite for this purpose were decided *after* the passage of Title II of the ADA, and thus fail to demonstrate an existing constitutional problem. Of the few cases that were decided before passage of the ADA, even fewer of them found a constitutional violation at all, and most of the remaining ones involved preliminary rulings, generalized attacks on prison conditions or medical services applicable to disabled and non-disabled inmates alike, or challenges to conditions in non-State prisons. The few of Petitioners' judicial decisions that arguably demonstrate unconstitutional treatment of disabled state prisoners, *by reason of their disabilities,* are so few and sporadic that they cannot possibly constitute the "widespread and persisting" problems of state discrimination that would have to exist before Congress could abrogate the states' sovereign immunity in this area.

III. Title II of the ADA is not a proportionate and congruent remedy for any history of unconstitutional discrimination against disabled state prisoners. That statute demonstrates none of the hallmarks of calibrated remedial legislation; rather, the relevant portions of Title II appear in the part of that title entitled "generally applicable provisions." Moreover, there is no indication in the statute that Congress, in enacting Title II, took into account in any way the special context of prisons and prisoners—not the differences in the constitutional rights held by state prisoners, and not the deference accorded to prison administrators.

Nor is Title II proportional and congruent when considered against Goodman's alternative argument that Title II is a constitutional means for enforcing the Cruel and Unusual Punishments Clause. Even putting aside the issue of whether that argument is "fairly included" within the "discrimination"-based question presented by Goodman, Title II would not be "congruent" to that constitutional right, because it would reduce a disabled prisoner's burden of proof from "deliberate indifference to serious medical needs" to a simple denial of services, programs, or activities. Moreover, viewing Title II as a federal remedy for violations of the Cruel and Unusual Punishments Clause would make it a seriously disproportionate remedy: It would give prisoners with disabilities, and *only* prisoners with disabilities, the right to enforce the Cruel and Unusual Punishments Clause.

ARGUMENT

"Congress may subject nonconsenting States to suit in federal court when it does so pursuant to a valid exercise of its § 5 power." *Garrett*, 531 U.S. at 364. Section 5 of the Fourteenth Amendment grants Congress the "power to enforce, by appropriate legislation," the substantive guarantees of § 1, including "by prohibiting a somewhat broader swath of conduct" than that "forbidden by the Amendment's text." *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000). Nonetheless, to validly abrogate the States' historic immunity from money-damages suits, § 5 legislation that reaches beyond § 1's guarantees must exhibit "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne*, 521 U.S. at 520; *see Garrett*, 531 U.S. at 365; *Lane*, 541 U.S. at 522. As the Court observed in *City of Boerne*, "Congress does not enforce a constitutional right by changing what the right is." 521 U.S. at 519.

Particularly in view of the fact that disability-based classifications have always been subject to rational-basis review, and in further view of this Court's decisions, relevant

in "the prison context," holding that "lawful incarceration brings about the necessary withdrawal of many privileges and rights," and that state prison officials are entitled to a broad range of discretion in the performance of their duties, *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987) (internal quotation marks and citation omitted), there is not a sufficient "congruence" or "proportionality" between Title II of the ADA and any "historical experience" (*South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966)) with state prisoner access to programs and services. Indeed, there is little to no record of such constitutional violations of disabled prisoners' rights in the state-prison context.[2]

I. MOST ACTIONS BY STATE PRISON OFFICIALS, AND DISTINCTIONS BASED ON DISABILITY, ARE SUBJECT TO DEFERENTIAL CONSTITUTIONAL REVIEW

"[T]he first step" in the *City of Boerne* congruence-and-proportionality test is to "identify with some precision the scope of the constitutional right at issue." *Garrett*, 531 U.S.

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[2] A suit "seeking to impose liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment," *Edelman v. Jordan*, 415 U.S. 651, 663 (1974), for "[a] general federal power to authorize private suits for money damages would place unwarranted strain on the States' ability to govern in accordance with the will of their citizens." *Alden v. Maine*, 527 U.S. 706, 750-51 (1999). Petitioner Goodman's Title II claims seek money damages that would be paid from public funds from the state treasury, and are thus barred for the reasons set forth in this brief. That is the only issue regarding relief before this Court, and Respondents invoke the Eleventh Amendment only to protect the public fisc.

Petitioners nonetheless blur the line between damages and injunctive relief as though the question of injunctive relief for prisoners is also before the Court. Respondents do not seek to take away from inmates the right to pursue appropriate injunctive relief, such as the injunction requiring the installation of a grab bar hypothesized by Petitioner Goodman. (Goodman Br. 37) It should be noted, however, that Goodman did not make such a direct request in his Complaint or in his emergency motion for a temporary restraining order. J.A. 53-58.

at 365; *Lane*, 541 U.S. at 522. Because Congressional power under § 5 is not "plenary" but is instead "remedial," *City of Boerne*, 521 U.S. at 522, judicial review of enforcement legislation must first include the identification of the Fourteenth Amendment "wrong" Congress sought to remedy. *Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 639 (1999), *citing City of Boerne*, 521 U.S. at 525. Only then can the "proportionality and congruence" of the congressional remedy be evaluated. In this case, the rights at issue are the rights of disabled state prisoners to not be denied, "by reason of . . . disability," "participation" in or "benefits of the services, programs, and activities of a state entity." 42 U.S.C. § 12132; *see, e.g., Garrett*, 531 U.S. at 365.

A. Disability-Based Classifications Are Subject To Rational-Basis Review

"[C]lassifications based on disability violate [the Fourteenth Amendment] if they lack a rational relationship to a legitimate governmental purpose." *Lane*, 541 U.S. at 522; *see Garrett*, 531 U.S. at 366; *City of Cleburne*, 473 U.S. at 446. There is no general fundamental constitutional right to state programs and services possessed by the class consisting of disabled persons. *Garrett*, 531 U.S. at 367-68; *Lane*, 541 U.S. at 522 ("Title II, like Title I, seeks to enforce this prohibition on irrational disability discrimination."); *see Hibbs*, 538 U.S. at 735-36 ("[I]n order to impugn the constitutionality of state discrimination against the disabled or elderly, Congress must identify, not just the existence of age- or disability-based state decisions, but a 'widespread pattern' of irrational reliance on such criteria.") (quoting *Kimel*, 528 U.S. at 90).

The fact that disability-based classifications receive only the most deferential constitutional review is an important consideration governing the congruence-and-proportionality inquiry in this case. In *Hibbs* and *Lane*, the only two of this Court's recent decisions to uphold congressional abrogation,

the fact that the asserted rights at issue were subject to heightened constitutional scrutiny made a critical difference in both analysis and result. In *Hibbs*, for example, the Court distinguished its prior decisions in *Garrett* and *Kimel* on the ground that, in the Family and Medical Leave Act of 1993, "Congress directed its attention to state gender discrimination, which triggers a heightened level of scrutiny"; because the standard of constitutional review for gender-based discrimination "is more difficult to meet than our rational-basis test—it must 'serv[e] important governmental objectives' and be 'substantially related to the achievement of those objectives'—it was easier for Congress to show a pattern of state constitutional violations." *Hibbs*, 538 U.S. at 736 (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996) (citation omitted, brackets in original)).

So, too, *Lane* upheld congressional abrogation of sovereign immunity under Title II of the ADA, as "applie[d] to the class of cases implicating the accessibility of judicial services," 541 U.S. at 531, on the ground that it was a congruent and proportional response to a legislative and historical record demonstrating the "'difficult and intractable proble[m]'" of disabled persons' "access to the courts." *Id.* (quoting *Hibbs*, 538 U.S. at 737) (brackets in original). As the Court explained, "Title II, like Title I, seeks to enforce this prohibition on irrational disability discrimination. But it also seeks to enforce a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review." *Id.* at 522-23. Indeed, in concluding that there was a history and pattern of unequal treatment of the disabled with respect to access to the courts, the Court's opinion cited *Hibbs* and explicitly relied on the "heightened standard of judicial scrutiny" that applies both to gender-based distinctions and to burdens on the access to courts: "Title II is aimed at the enforcement of a variety of basic rights, including the right of access to the courts at issue in this case, that call for a standard of judicial review at least as searching, and in some cases more searching, than

the standard that applies to sex-based classifications." *Id.* at 529 (citing *Hibbs*, 538 U.S. at 735-37).

There is good reason for the distinction drawn by *Hibbs* and *Lane*. It is "easier for Congress to show a pattern of state constitutional violations" in areas where such heightened levels of scrutiny are applied (*Hibbs*, 538 U.S. at 736), because heightened constitutional scrutiny reflects a judicial judgment, based on history and experience, that such violations are more commonplace, more invidious, and thus in greater need of judicial remediation. A heightened standard of constitutional scrutiny carries with it a concomitantly lower burden of proof for plaintiffs—and, in the case of distinctions subject to the highest level of constitutional review, "strict scrutiny," history and experience teaches that the likelihood of invidious discrimination is so great that simply demonstrating the existence of the different treatment shifts the burden of disproving a violation to the government.

But this case—in sharp contrast to *Hibbs* and *Lane*—presents no distinction or other governmental action deserving of a heightened standard of constitutional scrutiny. A disabled state prisoner here seeks to enforce, via claims for money damages against the State, a wide array of claimed rights to programs and services, ranging from a right to adequate sanitation in his cell to a right to television. (J.A. 34-48) The differences in legal treatment between prisons and other public institutions, and between fundamental and non-fundamental rights, are crucial to understanding why the legislative and historical record before Congress shows no similar constitutional problem of access by the disabled in the context of State prisons for which Title II could be said to be a "congruent and proportional response."

B. Constitutional Review Of Disability-Based Classifications In The Prison Context Is Further Constrained By The Essential Nature Of Incarceration And The Rule Of Deference To Prison Officials' Actions

Even beyond the deferential rational-basis review generally provided to disability-based legal classifications, *see Garrett*, 531 U.S. at 366, there is an additional and critical factor that "applies to the class of cases implicating" access to programs and services in state prisons (*Lane*, 541 U.S. at 533-34): the historical deference granted to prison administrators in the performance of their duties and the classification of inmates.

Because of the basic nature of state imprisonment, it is difficult for any state prisoner, disabled or not, to advance a plausible constitutional claim for deprivation of access to programs and services. "'Lawful incarceration brings about the necessary withdrawal of many privileges and rights, a retraction justified by the considerations underlying our penal system.'" *O'Lone*, 482 U.S. at 348 (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987)). "Prisons, by definition, are closed societies, populated by individuals who have demonstrated by their inability, or refusal, to conform their conduct to the norms demanded by a civilized society. Of necessity, rules far different from those imposed on society at large must prevail within prison walls." *Jones v. N.C. Prisoners' Labor Union*, 433 U.S. 119, 137 (1977) (Burger, C.J., concurring). Indeed, some rights considered fundamental outside prison walls are nonexistent or virtually nonexistent within them.[3]

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[3] For example, "the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell." *Palmer v. Hudson*, 468 U.S. 517, 526 (1984). States may constitutionally prohibit convicted felons from voting. *See, e.g., Richardson v. Ramirez*, 418 U.S. 24, 56 (1974). And this Court has held that the Constitution creates no liberty interest in a prisoner seeking to

For these reasons, claimed deprivations of constitutional rights inconsistent with imprisonment are subject to review only for a rational relationship to legitimate government interests, even where the rights asserted may be said to be fundamental. "[A prison regulation] is valid if it is reasonably related to legitimate penological interests'." *Turner*, 482 U.S. at 89 (quoting *Jones*, 433 U.S. at 128). The "evaluation of penological objectives is committed to the considered judgment of prison administrators, 'who are actually charged with and trained in the running of the particular institution under examination.'" *O'Lone*, 482 U.S. at 349 (quoting *Bell v. Wolfish*, 441 U.S. 520, 562 (1979)). When a state correctional institution is involved, the deference of the federal courts is even more appropriate. *Turner*, 482 U.S. at 85.

Consistent with these principles, the Court in *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003), applied *Turner v. Safley* to reject an inmate's claim that Michigan prison regulations restricting or forbidding inmate "contact visits" violated his fundamental constitutional right to association. *See, e.g., Roberts v. United States Jaycees*, 468 U.S. 609, 618-20 (1984). The Court upheld the Michigan prison regulations, not on the basis of any heightened constitutional scrutiny, but because "the challenged regulations bear a rational relation to legitimate penological interests." *Overton*, 539 U.S. at 132. Rationality review, not heightened constitutional scrutiny, was appropriate because "[t]he very object of imprisonment is confinement," and "freedom of association is among the rights least compatible with incarceration." *Id.* at 131. *See also Johnson v. California*, 125 S. Ct. 1141, 1149 (2005) (noting that rational-relationship test has been applied to evaluation of asserted constitutional rights

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avoid transfer to more adverse conditions of confinement. *Meachum v. Fano*, 427 U.S. 215, 225 (1976).

"'inconsistent with proper incarceration'") (quoting *Overton*, 539 U.S. at 131).[4]

Free and unfettered access to, and participation in, "services, programs, or activities of a public entity" (42 U.S.C. § 12132) are likewise inconsistent with the nature of incarceration, even though prisons would otherwise fall within the language of Title II of the ADA. *Penn. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 209 (1998) (reserving question presented by this case). This is made even clearer by the ADA rights that Goodman claims in this case, which include asserted broad rights to placement in the general population at a medical prison, "adequate" access to the law library, access to the chapel, access to a television, counseling services, educational services, phone calls, entertainment, and vocational training. (J.A. 65, 105) Each of those asserted rights would be subject to the *Turner v. Safley* rational-relationship inquiry. *See, e.g., Lewis v. Casey*, 518 U.S. 343, 351, 356 (1996) (holding that prisoners do not have a "abstract, freestanding right to a law library or legal

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[4] The United States nonetheless claims that "*Turner* review is more exacting than rational-basis review." (U.S. Br. 37) At best, this argument appears to be a semantic quibble. The *Turner* standard—"rationally related to legitimate penological interests"—obviously "echoes the rational-basis test" (*Kelo v. City of New London*, 125 S. Ct. 2655, 2669 (2005) (Kennedy, J., concurring)), which is frequently stated as "rationally related to a legitimate governmental purpose." *City of Cleburne*, 473 U.S. at 446. For another, the fact that *Turner*'s rational-relationship test resulted in "striking down marriage restrictions" imposed by a prison (U.S. Br. 37) demonstrates little, as the Equal Protection Clause's rational-basis test, too, has been used on occasion to strike down governmental enactments. *See, e.g., Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster Cty.*, 488 U.S. 336 (1989). And, in all events, whatever minimal differences there might be between the *Turner* rational-relationship inquiry and the rational-basis test of the Equal Protection Clause, it would be unnecessary to resolve them in this case, as the more important point is that Title II of the ADA provides substantially greater legal protections to the rights of inmates with a disability than does the Constitution, even under *Turner*'s rational-relationship inquiry. *See* Section III, below.

assistance" and "leav[ing] it to prison officials to determine how best to ensure that inmates . . . have a reasonably adequate opportunity to file nonfrivolous legal claims challenging their . . . conditions of confinement"). Indeed, § 1983 prisoner suits seeking both monetary and injunctive relief for these types of claims have been roundly rejected by the courts.[5]

Decisions by state prison officials regarding whether to place an inmate within the general population or not are likewise subject only to rational-relationship review, with significant deference given to the prison officials' decisions. This is for good reason: Goodman says the State has discriminated against him under the ADA by *not* placing him in the general population. (J.A. 35) Yet the United States' Addendum B refers to at least three instances where prison administrators were cited for violating constitutional rights of inmates by placing disabled inmates in the general prison population.[6] *See also Cortes-Quinones v. Jiminez-Nettleship*,

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[5] *See, e.g., More v. Farrier*, 984 F.2d 269, 271 (8th Cir. 1992) (claimed right to television by disabled inmate: "[d]espite television's importance in modern society, appellees have no fundamental right to in-cell cable television, and wheelchair-bound inmates are not a suspect class"); *Elliott v. Brooks*, 188 F.3d 518 (10th Cir. 1999) (no constitutional right to watch television in prison) (table, text in Westlaw); *Baumann v. Ariz. Dep't of Corr.*, 754 F.2d 841, 846 (9th Cir. 1985) (no constitutional violation by prison's limitation of jobs and educational opportunities) (citing *Rhodes v. Chapman*, 452 U.S. 337, 348 (1981)); *Hoptowit v. Ray*, 682 F.2d 1237, 1254-55 (9th Cir. 1982) ("Idleness and the lack of [vocational, recreational, and educational] programs are not Eighth Amendment violations. The lack of these programs simply does not amount to the infliction of pain.") (citing *Rhodes v. Chapman, supra*); *Gibson v. Fed. Bureau of Prisons*, 121 Fed. Appx. 549, 551 (5th Cir. 2004) (inmate has no protected liberty interest in eligibility for a prison drug treatment program) (citing *Moody v. Daggett*, 429 U.S. 78, 88 n.9 (1976)).

[6] The Department of Justice found that Pennsylvania (not Massachusetts, as the United States' Addendum erroneously states) prison authorities violated the Constitution at Western State Correctional Institution because "[m]entally ill inmates who should be separated from the general

842 F.2d 556, 560 (1st Cir. 1988) (finding defendant liable under Eighth Amendment for being "deliberately indifferent" to mentally disabled inmate's health and safety by failing to segregate him from general population, which led to his beating death in the general population).

All that said, State prison inmates like Goodman are certainly not void of basic rights while incarcerated. Prison inmates possess some level of Due Process and Equal Protection rights, as well as an Eighth Amendment right to be free of cruel and unusual punishments. "[P]rison officials must ensure that inmates receive adequate food, clothing, shelter and medical care, and must take 'reasonable measures to guarantee the safety of the inmates.'" *Farmer v. Brennan*, 511 U.S. 825, 833 (1994) (quoting *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984)). "[D]eliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain . . ." proscribed by the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). Indeed, Goodman's Eighth Amendment claims, which are directed to his cell's size and sanitation conditions, and to prison officials' alleged deliberate indifference to his serious medical needs, will continue regardless of how this Court answers the questions presented. If those allegations are ultimately proven, Petitioner Goodman would be entitled to relief under the Eighth Amendment. *Hope v. Pelzer*, 536 U.S. 730 (2002).

The United States nonetheless claims that "[w]hile many of th[e] constitutional claims [by prisoners] are invoked with appropriate deference to prison officials, that is not true of Eighth Amendment claims . . . ." (U.S. Br. 37 (citation

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population are not always separated." U.S. Addendum B, 2b. Hawaii (*id.*, 3b) and Guam (*id.*, 20b) were similarly chastised by the United States' Addendum for failing "to . . . segregate inmates with physical or mental impairments, which leads to failure to house such inmates safely. 'This failure results in vulnerable inmates being subject to predation in the general population.'" *Id.*

omitted)) But even that constitutional guarantee is addressed with due regard for the needs and realities of prison administration: "A prison official's duty under the Eighth Amendment is to ensure '"reasonable safety,"' a standard that incorporates due regard for prison officials' 'unenviable task of keeping dangerous men in safe custody under humane conditions.'" *Farmer*, 511 U.S. at 844-45 (quoting *Helling v. McKinney*, 509 U.S. 25, 33 (1993) and *Spain v. Procunier*, 600 F.2d 189, 193 (9th Cir. 1979) (Kennedy, J.) (citations omitted)). That is why the standard of liability under that amendment is the "more blameworthy" (*Farmer*, 511 U.S. at 835), "heightened" (*Corr. Servs. Co. v. Malesko*, 534 U.S. 61, 73 (2001)) standard of "deliberate indifference."

In sum: Claims directed to a disabled inmate's access to public services, programs, and activities would be subject to the most relaxed standard of constitutional review—the rational-basis test. Accordingly, Congress would have to have made the most substantial showing of a pattern of state constitutional violations in order to demonstrate that Title II is a proportional and congruent remedy, and thus "appropriate legislation" under § 5. *Cf. Hibbs*, 538 U.S. at 736. Congress did not make those findings, and it could not have made those findings, as no such record existed.

II. IN ENACTING TITLE II OF THE ADA, CONGRESS DID NOT IDENTIFY A HISTORY AND PATTERN OF UNCONSTITUTIONAL DISCRIMINATION BY THE STATES AGAINST DISABLED STATE PRISON INMATES

"Congress' § 5 authority is appropriately exercised only in response to state transgressions." *Garrett*, 531 U.S. at 368. Thus, Congress cannot pass legislation that abrogates the States' Eleventh Amendment sovereign immunity without identifying a "widespread and persisting" pattern of unconstitutional discrimination requiring a federal remedy. *Fla. Prepaid*, 527 U.S. at 645-46; *see also Garrett*, 531 U.S.

at 368-74; *Kimel*, 528 U.S. at 81-82; *City of Boerne*, 521 U.S. at 531. For Petitioners to succeed in showing that Congress meant to abrogate the States' historical immunity and allow claims by state prisoners for monetary damages against the State, they must demonstrate that Congress had a record before it that established such a pattern of state discrimination against disabled state prisoners with respect to the provision of public services, programs, and activities. This they cannot do.

A. The Proper Context For Evaluating The Abrogation Claim In This Case Is The Specific Prison Context, Not The General Area Of "State Services And Programs"

As Petitioners recognize, the issue before the Court—and the sole question presented—asks whether Title II was a valid exercise of Congress' § 5 authority *in the specific context* of state prison administration. (U.S. Br. 11-16; Goodman Br. 11-12.) Title II does not abrogate the States' sovereign immunity unless Congress determined, *when it passed the ADA*, that there existed a widespread pattern of discrimination with respect to the provision of public services, programs, and activities to the disabled *in state prisons*. *Compare, e.g., Lane*, 541 U.S. at 530-31 (noting "long history . . . [of] unequal treatment of disabled persons *in the administration of judicial services*" (emphasis added)) *with, e.g., Garrett*, 531 U.S. at 368 ("The legislative record of the ADA, however, simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled.").

Lane confirms this specific standard. In a series of footnotes, the Court outlined a "variety of settings" in which its own cases had previously identified unconstitutional treatment of the disabled by state agencies, including areas such as voting, marriage, and zoning. *Lane*, 541 U.S. at 524-25 nn. 5-14. Among these many and varied examples, the Court cited only three lower-court cases—two of which

could not have been before Congress when it passed Title II of the ADA, since they postdate its 1990 enactment by nearly a decade—where disabled inmates had claimed such violations. *Id.* at 525 n.11.[7]

But even having surveyed this broad range of examples, the Court declined "to consider Title II, with its wide variety of applications, as an undifferentiated whole." *Lane*, 541 U.S. at 530. Rather, the Court focused its analysis on "the class of cases implicating the accessibility of judicial services." *Id.* at 530-31 ("Whatever might be said about Title II's other applications, the question presented in this case is not whether Congress can validly subject the States to private suits for money damages for failing to provide reasonable access to hockey rinks, or even to voting booths, but whether Congress had the power under § 5 to enforce the constitutional right of access to the courts."). The Court's inclusion of "the penal system" as one of "a wide range of public services, programs, and activities" discussed in *Lane*, 541 U.S. at 524, says little to nothing regarding the question presented here. As we show below, it is clear that Congress did not find—nor could it have found—"widespread and persisting" discrimination on the basis of disability with respect to the provision of services, programs, or activities to state prisoners.

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[7] The Court cited three cases: *LaFaut v. Smith*, 834 F.2d 389 (4th Cir. 1987); *Schmidt v. Odell*, 64 F. Supp. 2d 1014 (D. Kan. 1999); and *Key v. Grayson*, 179 F.3d 996 (6th Cir. 1999). Each is objectively inapposite. *LaFaut*, an Eighth Amendment deliberate-indifference case, is the only one of the three decided before the ADA, and it involved a *federal* prison. 834 F.2d at 389-90. *Schmidt*, also an Eighth Amendment case, is similarly inapposite because it involved a county jail, not a state prison. 64 F. Supp. 2d at 1016. And *Key* was an ADA case that did not address the abrogation issue at all, but simply assumed that a deaf inmate's claim that the denial of an interpreter to attend sex-offender therapy sessions violated his ADA and Rehabilitation Act rights; moreover, the Sixth Circuit in that case held that prison officials were entitled to qualified immunity since the application of those acts to prisons and prisoners was not "clearly established" in 1996. 179 F.3d at 1002.

B. The Legislative Record Does Not Show That Congress Enacted The ADA On The Basis Of Fourteenth Amendment Violations In The State Prison Context

Petitioners' briefs themselves reveal the lack of support for their position in the Congressional history. Petitioners' heavy reliance on hearings that took place in the 1970s and early 1980s in connection with *other* legislation Congress enacted to address prisoners' needs (including a scattering of lower court decisions cited there), together with their virtual silence as to the legislative record of the ADA itself, speaks volumes. This near-total dependence on oblique and circumstantial "evidence" comes nowhere close to satisfying the requirements of this Court's decisions in this area.

The Legislative History of the ADA Itself. The legislative history of the ADA reflects that Congress' central concern was integrating "persons with disabilities *into the economic and social mainstream of American life.*" H.R. Rep. No. 101-485, Pt. 2, at 50, *reprinted in* 1990 U.S.C.C.A.N. 303, 332 (emphasis added). *See also id.*, Pt. 1, at 24, *reprinted in* 1990 U.S.C.C.A.N. 267, 268 (describing the purpose of the ADA as to "permit the United States to take a long-delayed but very necessary step to welcome individuals with disabilities fully into the mainstream of American society"); *id.*, Pt. 2, at 22, *reprinted in* 1990 U.S.C.C.A.N. at 304 ("The purpose of the ADA is to provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities and to bring persons with disabilities into the economic and social mainstream of American life; . . . ."); *id.*, Pt. 3, at 1, *reprinted in* 1990 U.S.C.C.A.N. 445, 446 (same); *id.*, Pt. 4, at 2, *reprinted in* 1990 U.S.C.C.A.N. 512, 512 (same); S. Rep. No. 100-116 (1989) (same).

That concern, of course, is the polar opposite of a concern with the state prisoner, who is—as shown in Section I, above—by definition *removed from* society's mainstream.

See generally Palmer, 468 U.S. at 526 ("Prisons, by definition, are places of involuntary confinement of persons who have a demonstrated proclivity for antisocial criminal, and often violent, conduct. Inmates have necessarily shown a lapse in ability to control and conform their behavior to the legitimate standards of society . . . ."). Thus, the statements of legislative intent found in the printed history of the ADA demonstrate, if anything, a Congressional concern with disabled persons in the "mainstream" of American society, and not those who have been removed from that mainstream society and incarcerated—just as the ADA legislative history considered in *Garrett* demonstrated a Congress concerned with "'employment in the private sector,'" and not state employment. 531 U.S. at 371-72 (quoting H.R. Rep. No. 101-485, pt. 2, p. 28, *reprinted in* 1990 U.S.C.C.A.N. at 310) (emphasis removed).

In perhaps the most telling instance of Petitioners' scarce support, the United States' brief avers: "Congress further heard that 'jailers rational[ize] taking away [inmates'] wheelchairs as a form of punishment as if that is different than punishing prisoners by breaking their legs.'" (U.S. Br. 23). The cited testimony had nothing to do with prisons. Instead, this quotation came from the testimony of Cindy Miller, a disabled woman from Boston employed as a "rehabilitation counselor." *See ADA: Joint Hearing on S. 2345*, 100th Cong. 1190 (statement of Cindy Miller). Ms. Miller's congressional testimony was styled as "a day in my diary of discrimination," and she began that "diary" by pointing out that to obtain the necessary assistance in getting in and out of bed, she lived—against her choice—with a roommate to whom she offered free rent, because the "personal care assistant rates of pay" were insufficient to attract qualified persons to work as overnight attendants. *Id.* She then spoke of her own fear of being "institutionalized"—not in a state prison, but in an institution for the disabled. Her references to "jailers" and "inmates" were harsh metaphors for disability-institution employees and patients:

> *I live in constant fear that* the economics argument subsidizing personal care assistants programs will be lost and *I will be institutionalized.* Because independent living is not a right to freedom for Americans with disabilities, this is a realistic fear. But it will not be my choice.
>
> *As a rehabilitation counselor, I have seen these institutions.* The smell of human waste and detergent has stuck in my throat. I have looked into the vegetative eyes of its inmates and the sterile environments. I have heard of the premature death rates and prevalence of pneumonia, literally allowing them to rot in their beds.
>
> *I have witnessed their jailers rational* [sic] *taking away their wheelchairs as a form of punishment as if that is different than punishing prisoners by breaking their legs. I have witnessed their jailers taking away their food as a form of punishment, as if that is different than starvation. I have witnessed their jailers talk about them in their third person and leave them naked to the public as if that does not strip them of their human dignity.*

Id. (emphasis added).

Indeed, a computer-database search of the legislative history of the ADA reveals several uses of this "prison" metaphor, but only one reference to conditions *in* prisons. That single reference is decidedly unhelpful to Petitioners.[8]

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[8] A search of the "ADA-LH" (Americans With Disabilities Act Legislative History) database on the Westlaw service, for documents containing *any* of the terms "prison!," "imprison!," "eighth amendment," or "cruel and unusual punishment!," returned only 17 references (none to "eighth amendment" or "cruel and unusual punishment"). Almost half of the 17 (eight) utilized the "imprisonment" metaphor to describe the challenges faced by persons with disabilities. *See, e.g., ADA: Joint Hearing on H.R. 2273,* at 49 (statement of Joseph L. Rauh, Jr.) ("The literal imprisonment of millions of disabled people because of an inaccessible transit system is a national disgrace."). Four more were references to reports explaining that the definition of "disability" did not extend to "having a prison record." *E.g.,* S. Rep. No. 101-116, at 22; H. Rep. No. 101-485, pt. 2, at 52, *reprinted in* 1990 U.S.C.C.A.N. at 334;

Other Congressional Hearings and Reports. Petitioners cite liberally to research and hearings placed before Congress with respect to the Rehabilitation Act of 1973 (Pub. L. No. 93-112, 87 Stat. 394) and the Civil Rights of Institutionalized Persons Act of 1980 ("CRIPA") (Pub. L. No. 96-247, 94 Stat. 349). (U.S. Br. 24-27; Goodman Br. 21, 23-25.) Both of these enactments took place over a decade prior to the passage of the ADA.

Particularly with respect to the CRIPA—the Civil Rights of *Institutionalized Persons* Act—it is hardly surprising that Congressional hearings, task forces, and reports addressed certain challenges faced by disabled prisoners (part of the class of "institutionalized persons" covered by the Act). Even so, the findings that led to both CRIPA and the Rehabilitation Act hardly support Petitioners' abrogation claim here. If anything, the more logical inference would be that Congress thought it had already sufficiently addressed any problem that might have existed with respect to the provision of state services, programs, and activities to incarcerated state prisoners.

Petitioners place additional reliance on a 1983 report of the United States Commission on Civil Rights. (*See* U.S. Br. 20 n.13; Goodman Br. 25 (each citing U.S. Civil Rights Commission, *Accommodating the Spectrum of Individual Abilities* (1983) (the "1983 Report")). This report, of course, was not in any way specific to state prison services and programs, but more generally addressed all areas in which

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id., pt. 3, at 28, *reprinted in* 1990 U.S.C.C.A.N. at 451. The only reference to actual prison conditions among these 17 was Senator Helms' stated concern, in floor debates, that the ADA would require restaurants to allow HIV-positive workers to be food handlers; Senator Helms noted that the *federal* Bureau of Prisons had prohibited HIV-positive inmates from engaging in any aspect of prison food service operations, and that passage of the ADA would "let prisoners get along without having HIV positive people preparing food," but restaurants serving the public could not follow the same practice. 136 Cong. Rec. S9527-02, S9535-36 (daily ed. July 11, 1990).

the Commission determined disabled Americans faced issues at that time. Appendix A to that report demonstrates this: It listed the "Criminal Justice System" (an area that itself included, but was scarcely limited to, state prisons) as one of those 22 areas, which also included limits on participation in the military, as well as restrictions on insurance. 1983 Report, Appendix A. Even putting aside the fact that the 1983 Report came seven years prior to the ADA's enactment, it hardly constitutes a sufficient—let alone sufficiently specific—record on which to base § 5 authority for Petitioners' claims.[9]

Petitioners similarly misplace reliance on the accounts contained in the 1990 report entitled "Task Force on the Rights and Empowerment of Americans with Disabilities, *From ADA to Empowerment*" (the "Task Force Report"). (U.S. Br. 20 n.12; Goodman Br. 25) In *Garrett*, the Court dismissed the dissenting opinion's reliance on this very report, noting that it did not consist of legislative findings, but of "unexamined, anecdotal accounts of 'adverse, disparate treatment by state officials,'" which "were submitted not directly to Congress but to the Task Force on the Rights and Empowerment of Americans with Disabilities, which made no findings on the subject of state discrimination in employment." 531 U.S. at 370-71. The same can be said of the absence of findings on the subject of state discrimination on the basis of disability in providing services to incarcerated prisoners.

The United States calls attention to several other studies evaluating the prevalence of mistreatment of disabled prisoners. (U.S. Br. 22-23) There is, however, no evidence

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[9] Goodman also notes that this Court cited the 1983 Report in *Lane*. (Goodman Br. 25 (citing *Lane*, 541 U.S. at 527)) This does nothing to help his cause, as *Lane* cited this report for the proposition that disabled members of free society, not convicted prisoners, were being excluded from "the particular services at issue in this case"—access to the courts. 541 U.S. at 527.

that Congress considered these studies—especially the one that postdates the ADA by more than a decade (*id.* at 22 & n.16)—when it enacted the ADA. And even if one could reasonably draw an inference that Congress had considered such studies, Congress's failure—in the face of those studies—to mention state prisons specifically in the findings undergirding Title II of the ADA suggests a Congressional judgment that no pervasive pattern of unconstitutional discrimination with respect to the provision of services and programs to disabled state prisoners had been documented or detected. *See, e.g., Garrett,* 531 U.S. at 371-72.

In short, the assortment of studies sprinkled through Petitioners' briefs "fall[s] far short of even suggesting the pattern of unconstitutional discrimination on which § 5 legislation must be based." *Garrett,* 531 U.S. at 370 (citing cases).

C. Petitioners' Reliance On Eighth Amendment Decisions To Support Their Abrogation Claims Is Without Merit

Both Petitioners urge that money damages under Title II of the ADA should be viewed, *inter alia,* as an appropriate remedy for a history of Eighth Amendment violations inflicted by prisons upon disabled prisoners, in view of that Amendment's applicability to the States through the Fourteenth Amendment's Due Process Clause. (Goodman Br. 14-16; U.S. Br. 21) This contention is meritless.

There is no basis for viewing Title II of the ADA, an anti-discrimination command, as any kind of remedy for Eighth Amendment violations. The "by reason of . . . disability" language of Title II of the ADA plainly indicates that it is an anti-discrimination statute for persons with disabilities, requiring that the discrimination take place "because of" the person's disability. *Olmstead v. L.C. ex rel. Zimring,* 527 U.S. 581, 597-98 & n.10 (1999); *see* 42 U.S.C. § 12132 (prohibiting exclusion of "qualified individual with a disability" from or denial of services, programs, or activities

"by reason of such disability"); *see generally Smith v. City of Jackson*, 125 S. Ct. 1536, 1549-50 (2005) (O'Connor, J., concurring). Yet the Eighth Amendment's Cruel and Unusual Punishments Clause is not primarily an anti-discrimination command, nor is it aimed just at the class of prisoners with a disability.

While it is conceivable that a prison could discriminate against disabled state prisoners by inflicting cruel and unusual punishments upon them "by reason of" their disability, there is quite obviously no pre-ADA record of such discrimination—and certainly none so "widespread and persisting," *Florida Prepaid*, 527 U.S. at 645-46—to even remotely support such a claim. The most that could possibly be said of Petitioners' collection of judicial decisions is that a few of them involve Eighth Amendment claims where the class of prisoners subjected to Eighth Amendment violations *included* some prisoners with an arguable "disability." But that would not demonstrate (nor would it even suggest) that these pre-ADA Eighth Amendment violations came about "by reason of" those prisoners' disabilities. *See* Section II(D), below.

Moreover, it is difficult to imagine that Congress intended to use Title II of the ADA to enlarge state prisoners' rights to sue state governments for money damages in Eighth Amendment cases. Like so many of the modern Congresses, the Congress that enacted the ADA was also concerned with the overflow of prisoner suits that was clogging the administration of justice in the federal district courts, and which, in 1995, comprised over one-quarter of the federal district courts' dockets. *See* 141 Cong. Rec. S7256 (daily ed. May 25, 1995) (statement of Sen. Kyl). This concern, which continues today, was recognized only three Congresses later in the Prison Litigation Reform Act of 1995, P.L. 104-134, tit. VII, 42 U.S.C. § 1997e, which circumscribed the ability of state prisoners to initiate and maintain federal litigation.

Further, as *amici* State of Tennessee *et al.* explain in their brief, "inmates have long filed civil rights suits under 42 U.S.C. § 1983 to enforce the same constitutional rights that petitioners argue should now be enforced by a money damages remedy under the ADA." Tennessee *et al.* Amicus Br. 23. That fact provides even more reason to doubt that Congress identified a special Eighth Amendment problem, or that it intended to require a further federal remedy *only* available to prisoners with a disability.

All that said, even if every single one of the pre-ADA Eighth Amendment cases cited by Petitioners were included in the Court's consideration of the issue, that still would not demonstrate the existence of a "widespread and persisting" problem that mandated a federal money-damages remedy against the States. We turn now to that issue.

D. Petitioners' Collection Of Judicial Decisions Demonstrates No History Of "Widespread And Persisting Deprivation Of Constitutional Rights" Regarding Disabled State Prisoners

The heart of Petitioners' case lies in their efforts to demonstrate that a "massive body" (Goodman Br. 26) of decided cases demonstrates a wide and systematic deprivation of Fourteenth Amendment rights of which Congress must have been aware in passing Title II of the ADA. *Fla. Prepaid*, 527 U.S. at 642 ("[T]he legislative record still provides little support for the proposition that Congress sought to remedy a Fourteenth Amendment violation in enacting the Patent Remedy Act."); *Garrett*, 531 U.S. at 374 ("there must be a pattern of discrimination by the States which violates the Fourteenth Amendment"); *Hibbs*, 538 U.S. at 735 ("Congress must identify . . . not just the existence of age- or disability-based state decisions, but a 'widespread pattern' of irrational reliance on such criteria"); *see also Lane*, 541 U.S. at 541 (Rehnquist, C. J., dissenting). But those cases do not show anything close to a "widespread pattern" of unconstitutional discrimination against disabled

state prisoners: Most of Petitioners' cases postdate the enactment of the ADA—and thus could not possibly have contributed to Congress' deliberations that led to the enactment of Title II; few of those that predate the ADA involve *state* prisons; and fewer still involve alleged discrimination with respect to services, programs, or activities against a class of disabled inmates (as opposed to other, generalized allegations of constitutional violations that included some disabled state inmates within their sweep). That leaves Petitioners with but scattered, isolated instances of claimed discrimination against state prison inmates with respect to prison services, programs, or activities. Under this Court's decisions, these cases cannot sustain Petitioners' § 5 abrogation claim.

1. Two-Thirds Of Petitioners' "Massive Body" Of Cases Could Not Have Been Considered By Congress Because They Postdate The 1990 Enactment Of The ADA

Petitioners must show that Congress was considering a pattern of widespread discrimination *when it enacted the ADA* in 1990. *See Fla. Prepaid*, 527 U.S. at 640 (noting that "the propriety of any § 5 legislation 'must be judged with reference to the historical experience . . . it reflects'" and that Congress had not identified a pattern of unremedied patent infringement by the States when it enacted the Patent Remedy Act) (quoting *City of Boerne*, 521 U.S. at 525); *Kimel*, 528 U.S. at 90 (legislative record revealed that "Congress had virtually no reason to believe that state and local governments were unconstitutionally discriminating against their employees on the basis of age" and that, therefore, "Congress had no reason to believe that broad prophylactic legislation was necessary in this field."); *Garrett*, 531 U.S. at 368 (asking "whether Congress identified a history and pattern of unconstitutional employment discrimination by the States against the disabled," and finding that it had not). The vast majority of Petitioners' cited cases postdates the 1990 enactment of the

ADA, and therefore cannot constitute evidence of Congress' review as a matter of objective fact.

Between them, Petitioners cite about 150 cases as "evidence" of data they claim Congress considered when it enacted the ADA in 1990. (U.S. Br. at Addendum A; Goodman Br. at 28-36 nn. 14-26) But, as shown in the Addendum to this brief, nearly two-thirds of those cited cases date *after* 1990. Only 54 of these cases pre-date the ADA. *See* Resps' Addendum, Table VII. In fact, these 54 decisions hail from only 35 States (plus the District of Columbia and Puerto Rico); 15 States are not even represented. Even if Congress had considered *all* of these pre-1990 cases—and there is no evidence that it did—their paucity alone may be the single greatest impediment to Petitioners' efforts to demonstrate abrogation. *Compare Garrett*, 531 U.S. at 370 ("Congress, in enacting the ADA, found that 'some 43,000,000 Americans have one or more physical or mental disabilities.' In 1990, the States alone employed more than 4.5 million people. It is telling, we think, that given these large numbers, Congress assembled only such minimal evidence of unconstitutional state discrimination in employment against the disabled.") (quoting 42 U.S.C. § 12101) (citation omitted).

Even so, those 54 pre-ADA decisions suffer from additional problems that render even that fraction of Petitioners' cases not probative of Congressional authority to abrogate States' sovereign immunity in this precise area.

2. Most Of Petitioners' Pre-ADA Cases Are Facially Inapposite

As shown in the Addendum to this brief, the vast majority of Petitioners' 54 pre-ADA cases did not even involve claims of discrimination against disabled state prisoners under the Fourteenth Amendment. *See* Resps' Addendum, Table VII. To the contrary, most of Petitioners' pre-1990 cases finding *any* kind of constitutional violation involve complaints regarding general deficiencies in medical care,

psychiatric treatment or other prison conditions *as applied to all inmates*, not just disabled inmates. *See* Resps' Addendum, Tables I, III. These cases objectively fail to establish Congressional concern with the type of *intentional* discrimination against disabled state prison inmates (or even the "deliberate indifference" of the Eighth Amendment) that would be required to justify Title II of the ADA as appropriate § 5 legislation as applied to the class of cases implicating the prison context. *Garrett*, 531 U.S. at 375 (Kennedy, J, concurring) (noting that "the failure to act or the omission to remedy" is not typically "the purposeful and intentional action required to make out a violation of the Equal Protection Clause"); *Hibbs*, 538 U.S. at 751 (Kennedy, J., dissenting) (similar); *cf. Fla. Prepaid*, 527 U.S. at 645 (noting that "the evidence before Congress suggested that most state [patent] infringement was innocent or at worst negligent").

At the most general level, Petitioners' selection of cases is premised on several unwarranted assumptions. Included among them are the assumption that all prisoners who need medical or psychiatric care are "disabled" within the meaning of the ADA, as well as the assumption that failing to provide adequate medical or psychiatric treatment to a prisoner in need of such treatment amounts to unconstitutional discrimination even where other inmates had no access to better care. A significant number of these cases also highlight problems that Title II of the ADA would not address. Conversely, other cases describe circumstances in which a disabled inmate with ADA rights would have relief that a non-disabled inmate facing exactly the same unfavorable condition (*e.g.*, lack of medical care) would not have. Specifically, Petitioners' pre-1990 cases are inapposite to establish Congress' authority in the following ways:

Prison Conditions Applicable To All Inmates. Twenty of Petitioners' 54 pre-ADA cases challenged—often through class actions—conditions of the entire prison facility, and thus applied *equally* to non-disabled inmates as well as

disabled ones. *See* Resps' Addendum, Table I. For example, *Balla v. Idaho State Board of Corrections*, 595 F. Supp. 1558, 1561 (D. Idaho 1984), and *Battle v. Anderson*, 376 F. Supp. 402, 415 (E.D. Okla. 1974), *aff'd in part, rev'd in part*, 993 F.2d 1551 (10th Cir. 1993), challenged certain prison conditions as they applied to the entire population. The plaintiffs in *Balla* alleged deficiencies in, *inter alia*, the prisoners' nutrition, clothing, and medical care. In ordering relief, the court mentioned that three inmates had special dietary requirements as a result of their specific medical conditions, and ordered those needs to be met. 595 F. Supp. at 1575, 1583. In *Battle*, the plaintiffs alleged that their prison administrators mistreated the inmates through acts such as racial segregation, prohibitions on religious congregation, punishment with chemical agents, refusal to provide meals that adhered to religious beliefs, and restrictions on reading materials, and they complained that their medical care, including psychiatric care, was inadequate. 376 F. Supp. at 415. Noting that medical and psychiatric care was deficient and posed a threat to the health and well-being of the "inmate population," the court ordered improvements. *Id.* at 416, 434. Neither court found that any prisoner suffered discrimination or any kind of Fourteenth Amendment violation as a result of a disability, nor did either court even mention any such allegation. In addition to *Balla* and *Battle*, 18 more of Petitioners' pre-ADA cases involve facts inapposite for the same reasons. *See* Resps' Addendum, Table I.

Facility-Wide Deficiencies In Medical Or Psychiatric Care. Nineteen of Petitioners' pre-ADA cases involved claims regarding inadequate medical or psychiatric care for the entire facility. *See* Resps' Addendum, Table III. Even under the unwarranted assumption that all inmates who need such treatment are perforce "disabled," it would not follow that such an omission would be unconstitutional discrimination prohibited by the Fourteenth Amendment. *See Garrett*, 531 U.S. at 375 (Kennedy, J., concurring);

Hibbs, 538 U.S. at 751 (Kennedy, J., dissenting); *Fla. Prepaid*, 527 U.S. at 645. Many of these cases would at most demonstrate an adverse, but not deliberate, impact on disabled persons. *See City of Boerne*, 521 U.S. at 530-31 ("In contrast to the record which confronted Congress and the Judiciary in the voting rights cases, RFRA's legislative record lacks examples of modern instances of generally applicable laws passed *because of* religious bigotry . . . It is difficult to maintain that [these laws of general applicability] are examples of legislation enacted or enforced *due to animus or hostility to the burdened religious practices* or that they indicate some widespread pattern of religious discrimination in this country." (citations omitted; emphasis added)).

No Ruling On The Merits. Fourteen of Petitioners' pre-ADA cases did not even decide the merits of Plaintiffs' Constitutional claims. *See* Resps' Addendum, Table II. For example, 6 of Petitioners' pre-ADA cases are preliminary-injunction rulings, which by definition precede any determination of the merits of the constitutional claims. *Id.* In *Duran v. Anaya*, 642 F. Supp. 510 (D.N.M. 1986), the court's preliminary injunction prohibited scheduled staffing reductions that, if permitted, would render the facility "unable to meet their constitutional obligation to provide . . . medical care, dental care and psychiatric care"—therefore *preventing* any constitutional violation from occurring. *Id.* at 525. Similarly, in *Eng v. Smith*, 849 F.2d 80 (2d Cir. 1988), the court found no abuse of discretion in the trial court's grant of preliminary injunctive relief in connection with class-action claims of systemic deficiencies in the state prison's mental-health-care system, but specifically noted that "we do not decide at this stage whether defendants' actions actually met the 'deliberate indifference' standard . . . ." *Id.* at 82. Likewise, 8 other cases involved reversals or denials of summary-judgment motions, or were remanded for further proceedings for other reasons. *See* Resps'

Addendum, Table II. These cases obviously are not particularly probative of actual constitutional violations.

Non-State Prison Facilities. Sixteen of Petitioners' pre-ADA cases involved non-state facilities such as county jails. *See* Resps' Addendum, Table V. Two of these cases actually involved *federal* prisons, which obviously cannot establish a pattern of intentional discrimination by the *States*. As this Court held in *Garrett*, "units of local government . . . are subject to private claims for damages under the ADA without Congress' ever having to rely on § 5 of the Fourteenth Amendment to render them so. It would make no sense to consider constitutional violations on their part, as well as by the States themselves, when only the States are the beneficiaries of the Eleventh Amendment." *Garrett*, 531 U.S. at 369 (citations omitted). *See also Lane*, 541 U.S. at 542 (Rehnquist, C. J., dissenting) ("Even if it were proper to consider this broader category of evidence, much of it does not concern *unconstitutional* action by the *States*. The bulk of the Court's evidence concerns discrimination by non-state governments, rather than the States themselves. We have repeatedly held that such evidence is irrelevant to the inquiry whether Congress has validly abrogated Eleventh Amendment immunity, a privilege enjoyed only by the sovereign States." (footnote omitted; emphasis in original)). Even though local jailing authorities may, under *some* states' law, be regarded as "arms of the state" for Eleventh Amendment immunity purposes (*cf.* Goodman Br. 21-22 n.7, citing *Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003) (en banc)), the fact remains that in 1990, when Congress enacted Title II of the ADA, "most courts and litigants assumed that county sheriffs . . . were indeed county officials for purposes of § 1983 litigation," and that only this Court's 1997 decision in *McMillian v. Monroe County*, 520 U.S. 781 (1997), spurred "a wave of litigation in which sheriffs have contested their status as local officials." Karen M. Blum, *Support Your Local Sheriff: Suing Sheriffs Under § 1983*, 34 STETSON L. REV. 623, 625-26 (2005).

Cases Where Non-Disabled Prisoners Claim The Same Problems Alleged By Petitioner Goodman. Twelve of Petitioners' pre-ADA cases involve circumstances where *non-disabled* inmates were subjected to conditions like those Goodman challenges, such as extremely constrained physical space, lack of cleaning products or assistance, insufficient toilet facilities, and exposure to human waste. *See* Resps' Addendum, Table IV. Aside from the paucity of these cases, this demonstrates—as shown in Section III—that a congressional response of granting a remedy only to *disabled* prisoners lacks both congruence and proportionality.

3. The Few Judicial Decisions Remaining Are Too Isolated And Sporadic To Demonstrate A "Widespread And Persisting" Pattern Of Unconstitutional Treatment Of Disabled State Prisoners

What is left of Petitioners' pre-ADA cases is few in number—11—and probative of little with any relevance to this case. *See* Resps' Addendum, Table VI. Even if one could reasonably reach the conclusion that these 11 cases had been specifically considered by Congress, this is far from sufficient to demonstrate a "widespread and persisting" problem in need of a federal remedy. *Fla. Prepaid*, 527 U.S. at 645-46.

It would be inappropriate to sustain Petitioners' abrogation claim based on this *post hoc* assemblage of a few judicial decisions, particularly when there is no evidence that Congress ever actually considered them. *Id.* at 647 ("The examples of States avoiding liability for patent infringement by pleading sovereign immunity in a federal-court patent action are scarce enough, but any plausible argument that such action on the part of the State deprived patentees of property and left them without a remedy under state law is scarcer still."). *See also Garrett*, 531 U.S. at 369-70 ("Respondents in their brief cite half a dozen examples from the record that did involve States . . . Several of these

incidents undoubtedly evidence an unwillingness on the part of state officials to make the sort of accommodations for the disabled required by the ADA . . . But even if it were to be determined that each incident upon fuller examination showed unconstitutional action on the part of the State, these incidents taken together fall far short of even suggesting the pattern of unconstitutional discrimination upon which § 5 legislation must be based."); *id.* at 371 n. 7 ("Only a small fraction of the anecdotes Justice BREYER identifies in his Appendix C relate to state discrimination against the disabled in employment. At most, somewhere around 50 of these allegations describe conduct that could conceivably amount to constitutional violations by the States, and most of them are so general and brief that no firm conclusion can be drawn."); *id.* at 375-76 (Kennedy, J., concurring) ("If the States had been transgressing the Fourteenth Amendment by their mistreatment or lack of concern for those with impairments, one would have expected to find in decisions of the courts of the States and also the courts of the United States extensive litigation and discussion of the Constitutional violations. This confirming judicial documentation does not exist. That there is a new awareness, a new consciousness, a new commitment to better treatment of those disadvantaged by mental or physical impairments does not establish that an absence of state statutory correctives was a constitutional violation.").[10]

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[10] *See also Hibbs*, 538 U.S. at 754-55 (Kennedy, J., dissenting) ("The paucity of evidence to support the case the Court tries to make demonstrates that Congress was not responding with a congruent and proportional remedy to a perceived course of unconstitutional conduct. Instead, it enacted as substantive entitlement program of its own. If Congress had been concerned about different treatment of men and women with respect to family leave, a congruent remedy would have sought to ensure the benefits of any leave program enacted by a State are available to men and women on an equal basis."); *Lane*, 541 U.S. at 547-48 (Rehnquist, C. J., dissenting) ("The barren record here should likewise be fatal to the majority's holding that Title II is valid legislation enforcing due process rights that involve access to the courts. This

In sum, Petitioners' collection of largely inapposite cases fails to demonstrate the existence of—let alone Congressional consideration of—a serious, widespread, and pervasive problem involving disabled state prison inmates and their access to state programs, services, or activities, and certainly none meriting the federal remedy prescribed by Title II of the ADA.

III. TITLE II OF THE ADA IS NOT A PROPORTIONATE OR CONGRUENT REMEDY UNDER SECTION 5

Even if the condition of relevant State misconduct could somehow be established in this case—and Section II, above, demonstrates that it cannot—Title II of the ADA independently fails the requirement that "the remedy imposed by Congress must be congruent and proportional to the targeted violation." *Garrett*, 531 U.S. at 374. *See also Civil Rights Cases*, 109 U.S. 3, 13 (1883) (Section 5 requires that the legislation be "adapted to the mischief and wrong which the [Fourteenth] [A]mendment was intended to provide against"). The congruence-and-proportionality requirement ensures proper respect for "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law." *City of Boerne*, 521 U.S. at 519. As applied to the class of cases involving disabled state prisoners' access to programs, services, and activities, Title II is "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Id.* at 532.

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conclusion gains even more support when Title II's nonexistent record of constitutional violations is compared with legislation that we have sustained as valid § 5 enforcement legislation. . . . Accordingly, Title II can only be understood as a congressional attempt to 'rewrite the Fourteenth Amendment law laid down by this court,' rather than a legitimate effort to remedy or prevent state violations of that amendment." (citations omitted)).

Title II of the ADA, as applied to state prisons, bears no markings of the sort of calibrated remedial legislation that could satisfy the § 5 requirement of "enforce[ment] by appropriate legislation." To begin, Title II contains not a word suggesting that any of its remedial provisions were directed specifically to the context of state prisons. Quite the contrary: Title II contains two parts—Part A, which is entitled "Prohibition Against Discrimination and Other *Generally Applicable Provisions*" (42 U.S.C. §§ 12131-12134) (emphasis added), and Part B, entitled "Actions Applicable to Public Transportation Provided by Public Entities Considered Discriminatory" (42 U.S.C. §§ 12141-12165). Viewed in that light, it is difficult to understand Part A's generalized remedial provisions "as responsive to, or designed to prevent unconstitutional behavior" as applied to state prisons and prisoners. *Garrett*, 521 U.S. at 532. Its "indiscriminate scope" confirms that it is anything but a proportionate response to a constitutional problem in state prisons. *Kimel*, 528 U.S. at 91.

Indeed, it is quite clear that in the ADA generally, and in Title II in particular, Congress was in fact changing the law to provide disabled persons with substantially greater legal rights and remedies than the Constitution afforded them: In the ADA's statement of findings and purpose, Congress declared that "individuals with disabilities are a discrete and insular minority . . . relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and . . . not truly indicative of the individual ability of such individuals to participate in, and contribute to, society." 42 U.S.C. § 12101(a)(7). Congress's use of the "discrete and insular minority" terminology, of course, is a direct quotation of the Court's famous footnote 4 in *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938), which made the case for "heightened scrutiny" of classifications burdening such "discrete and insular" groups; and Congress's further reference to "characteristics that are

. . . not truly indicative of the individual ability of such individuals to participate in, and contribute to, society" echoes the Court's rationale for viewing classification of "quasi-suspect" classes with similarly searching scrutiny. *Mathews v. Lucas*, 427 U.S. 495, 505 (1976) (illegitimacy has "no relation to the individual's ability to participate in and contribute to society").

Congress's intent to treat the disabled as at least a quasi-suspect class with respect to access to programs and services is clear. But that goes far beyond the Constitution's requirements, which treat the disabled as a non-suspect class entitled only to rational-basis constitutional scrutiny, and which further view prison officials' actions and classifications with significant deference. *City of Cleburne, supra*; *Turner, supra*. And it goes far beyond any such rights accorded by the Eighth Amendment, which, it bears repeating, requires "deliberate" indifference, not merely a denial of access.

A carefully calibrated remedy applicable to the constitutional claims of disabled state prisoners would have to take into account the significant deference to prison administration, and would further have to recognize the significant differences in the substance and scope of constitutional rights possessed by state prisoners—but there is not a hint of that anywhere in the statute. The ADA is thus policy-based social-advancement legislation that seeks to give the disabled substantially greater rights of access to public services, programs, and activities than any provision of the Constitution would. That is perfectly appropriate for Congress to do when it makes a generally applicable law, and it is indeed laudatory, but more is required before such laws of general application can be applied to permit access to a sovereign state's treasury. The careful calibration of remedy to wrong that would be required to allow state prisoners to bring Title II suits for money damages is just not present here.

The United States nonetheless claims that Title II's requirements of nondiscriminatory access, reasonable accommodations, and reasonable modifications are all "sensitive to the unique security needs in prisons and tailored to the constitutional problems it remedies." (U.S. Br. 42) That is not so. As we have shown, there is no evidence whatsoever that Congress in passing the ADA was intending to be "sensitive" to the States' substantial interest in prison administration, or that Title II was somehow specially "tailored" to prisons. Rather, Congress addressed most of Title II through "[g]enerally [a]pplicable [p]rovisions." Unsurprisingly, there is not a single provision in Title II that even attempts to take into account the "unique circumstance of incarceration," *McNeil v. United States*, 508 U.S. 106, 113 (1993), or "the peculiar and restrictive circumstances of penal confinement." *Jones v. N.C. Prisoners' Union*, 433 U.S. at 125.

Apparently recognizing the serious risk that Title II's provisions will not survive the Court's prescribed congruence-and-proportionality analysis, Petitioner Goodman offers an alternative, fallback argument. Goodman claims that Title II is validly applied to allow money damages against states at least "as applied to cases where the state actually violated a plaintiff's constitutional rights" (Goodman Br. 45), such that it should at a minimum be sustained as an appropriate statutory remedy for Goodman's constitutional claims under the Cruel and Unusual Punishments Clause.

There are several problems with this fallback argument. *First*, it is not "fairly included" within the question presented by Goodman, which asks whether Congress validly abrogated state sovereign immunity "for suits by inmates with disabilities *challenging discrimination by* state-operated prisons." Goodman Br. i (emphasis added); *see* S. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."). Goodman's claim of "deliberate indifference" to injury or

illness is not a disability-based "discrimination" claim, but a claim that sounds in individualized treatment. *See, e.g., Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976).

Second, Goodman's proposed approach is inconsistent with the approach taken by this Court in *Lane*, where abrogation was sustained "as it applies to the class of cases implicating the accessibility of judicial services." 541 U.S. at 531. While that is undoubtedly why Petitioners have framed the issue in this Court as one dealing with the application of Title II "in the prison context" (*see, e.g.*, Goodman Br. 14; *see also id.* at 12 ("in the class of cases implicating the accessibility of prisons and discrimination against inmates with disabilities"); U.S. Br. 9), Goodman's attempt to redefine the analysis as one appropriately done not just on a "class of cases," but on a case-by-case basis, is inconsistent with *Lane*, and inconsistent with the way in which Congress legislates, which is decidedly not on a "case-by-case" basis.

Goodman nonetheless claims (Goodman Br. 47) that his alternative case-by-case approach is supported by *United States v. Raines*, 362 U.S. 17 (1960), and *Griffin v. Breckenridge*, 403 U.S. 88 (1966). It is not. In *Raines*, the defendants were state actors who claimed that the Civil Rights Act of 1957, 42 U.S.C. § 1971, could not constitutionally be applied to them because subsection (c) of that statute reached beyond the Constitution and applied to "any person" who engaged (or was reasonably thought about to engage) in acts which would deprive any person of one of the rights guaranteed by subsection (a) of that act, and not just state actors. 362 U.S. at 19-20. The Court held that the state-actor defendants could not facially attack § 1971 on the ground that applying it to non-state-actor defendants exceeded the congressional power under § 2 of the Fifteenth Amendment (which contains the same "appropriate legislation" language as § 5 of the Fourteenth Amendment). *Id.* at 24-25. That holding was an unexceptional application of the rule that "facial" challenges to statutes are almost

never appropriate. *See Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501-02 (1985) (explaining the holding of *Raines* in this fashion); *United States v. Booker*, 125 S. Ct. 738, 774 n.1 (2005) (Stevens, J., dissenting in part) (similar). Here, by contrast, there is no place for application of the principle that "a litigant may only assert his own constitutional rights or immunities," *Raines*, 362 U.S. at 22, as it is the State of Georgia, the Georgia State Prison, and the prison's officials and employees who are invoking the constitutional objection in this case.[11]

To the extent that *Raines* is at all instructive in this case, it only serves to demonstrate why Title II of the ADA is not a congruent or proportional congressional response to claims of cruel and unusual punishment. In *Raines*, subsection (a) of the challenged statute guaranteed the right to vote "without distinction of race, color, or previous condition of servitude." That is precisely the guarantee of § 1 of the Fifteenth Amendment ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."), so the rights protected by subsection (a) of the statute were perfectly congruent with the constitutional right.

But applying the ADA to enforce the Eighth Amendment's Cruel and Unusual Punishments Clause would be wildly incongruent and disproportionate to even that constitutional right. This Court's precedents require a prisoner claiming cruel and unusual punishment to prove an objective component—that the defendant's conduct objectively rises to the level of a constitutional violation by depriving the prisoner of the "minimal civilized measure of life's necessities"—and a subjective component, establishing

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[11] *Griffin v. Breckenridge*, 403 U.S. 88 (1971) is to the same effect. *Griffin* cited *Raines* as an example of a case that had "firmly rejected" the Court's ancient "severability rule that required invalidation of an entire statute if any part of it was unconstitutionally overbroad." *Id.* at 104.

that the defendant's state of mind was that of "deliberate indifference" to the prisoner's "serious medical needs." *See, e.g., Wilson v. Seiter,* 501 U.S. 294, 298 (1991) (quoting *Rhodes v. Chapman,* 452 U.S. 337, 342 (1981) and *Estelle,* 429 U.S. at 106)). Yet allowing a disabled prisoner to enforce the Cruel and Unusual Punishments Clause through Title II of the ADA would lighten his burden of proof, from a "deliberate indifference"-to-serious-medical-needs standard to a simple denial-of-services standard. *See* 42 U.S.C. § 12132 ("[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services . . . of a public entity."). What is more, *only* prisoners with a "disability" within the meaning of the statute could enforce the Cruel and Unusual Punishments Clause and obtain money damages via the ADA; non-disabled prisoners suffering cruel and unusual punishment could not. This substantial expansion of constitutional rights, and the simultaneous underinclusive-ness of the class of individuals who could obtain the statute's remedies, demonstrates the statute's lack of proportion and congruence.

Third, for essentially the same reasons set forth in Section II, above, and illuminated by the Appendix to this brief, there was no evidence of "widespread and unconstitutional" cruel and unusual punishments of disabled state prisoners meriting a further federal remedy.

In sum, whether Title II of the ADA is evaluated with reference to "the prison context" generally, or as a statute seeking to remediate cruel and unusual punishments, that law lacks the proportionality and congruity demanded by this Court's decisions.

CONCLUSION

For these reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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TABLE I

	Cases Challenging General Prison Conditions
1.	***Balla v. Idaho State Bd. of Corr.*, 595 F. Supp. 1558, 1569 (D. Idaho 1984)** Found deficiencies in nutrition, medical care, psychiatric care, and adequacy of clothing. *Id.* at 1575-78. Also found due process violations in connection with disciplinary procedures. *Id.* at 1582.
2.	***Battle v. Anderson*, 376 F. Supp. 402, 415 (E.D. Okl. 1974)** Prison conditions post-riot. Guards used mace and tear gas for discipline. *Id.* at 413-15, 423. Court found "systemic medical deficiencies." *Id.* at 416, 424. Plaintiffs claimed, *inter alia*, that prison failed to provide adequate law library, denied opportunity for religious gatherings, refused to provide meals that adhered to religious beliefs, and restricted reading materials. *Id.* at 407-08.
3.	***Cody v. Hilliard*, 599 F. Supp. 1025, 1058-59 (D.S.D. 1984), *aff'd*, 799 F.2d 447 (8th Cir. 1986), *rev'd in part*, 830 F.2d 912 (8th Cir. 1987) (en banc)** "The plaintiff class challenges the constitutionality under the first, fifth, sixth, eighth and fourteenth amendments to the United States Constitution of numerous conditions and practices of confinement." 599 F. Supp. at 1026. Plaintiffs complained about fire protection, ventilation, heating, lack of hot water, lighting, lack of medical and dental care, inadequate mental health care, double-celling, improper milk pasteurization, improper food storage, and various other conditions. *Id.* at 1029.

Cases Challenging General Prison Conditions	
4.	***Duran v. Anaya*, 642 F. Supp. 510 (D.N.M. 1986)** Court granted preliminary injunction to *prevent* proposed staff reductions that would probably not permit maintenance of minimal constitutional standards in medical care, mental health care, and security. *Id.* at 575.
5.	***Inmates of Occoquan v. Barry*, 717 F. Supp. 854 (D.D.C. 1989)** Class action claiming Eighth Amendment violations and seeking declaratory and injunctive relief for "excessive inmate population; deficiencies in environmental health and safety; food services; fire safety; medical and dental services; and mental health care." *Id.* at 854.
6.	***James v. Wallace*, 382 F. Supp. 1177 (M.D. Ala. 1974)** Class plaintiffs sought declaratory and injunctive relief for prison conditions without adequate treatment, reform, or rehabilitation, claiming this violated their rights under the Eighth and Fourteenth Amendments. *Id.* at 1178.
7.	***Kendrick v. Bland*, 541 F. Supp. 21 (W.D. Ky. 1981)** Class action brought by prisoners at Kentucky State Penitentiary regarding broad range of conditions, necessitating broad consent decree in areas such as crowding, vocational and educational programs, food service, due process for disciplinary procedures, religion, inmate mail, access to the courts, medical and mental health services and racial discrimination. *Id.* at 22, 27-49.

	Cases Challenging General Prison Conditions
8.	***Laaman v. Helgemoe*, 437 F. Supp. 269 (D.N.H. 1977)** Class action on behalf of entire prison population detailing a multitude of deficiencies in conditions at entire facility. Court entered a 16-category order regarding aspects to be corrected. Found medical services and facilities deficient as a whole, and found totality of conditions deficient. *Id.* at 324-25.
9.	***Lightfoot v. Walker*, 486 F. Supp. 504 (S.D. Ill. 1980)** Class action "for the benefit of all prisoners . . . seeking declaratory and injunctive relief [] to stop state prison officials from maintaining an inadequate health care system for the prisoners . . . ." *Id.* at 505. "Based on the totality of the evidence, the Court finds that these inadequacies result in a health care delivery system so wholly inadequate as to lead to unnecessary suffering to the plaintiff class." *Id.* at 525. "The abysmal conditions throughout the housing units, segregation, reception and classification, the medical unit and food services have continued to exist for years and, indeed . . . have worsened in some respects . . . ." *Id.* at 513.
10.	***Mitchell v. Untreiner*, 421 F. Supp. 886, 891 (N.D. Fla. 1976)** Court held that "the punitive and inhumane conditions of confinement within the Escambia County Jail clearly violate inmates' rights under the First, Fourth, Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments . . . The totality of circumstance of confinement . . . and the sub-human level of existence imposed there violates all civilized concepts of human rights." *Id.* at 893, 896.

Cases Challenging General Prison Conditions	
11.	***Negron v. Preiser*, 382 F. Supp. 535 (S.D.N.Y. 1974)** Conditions applied universally within mental institution maintained by department of correction—class action challenging conditions of confinement at Mattewan State Hospital, New York. *Id.* at 537.
12.	***Nelson v. Collins*, 455 F. Supp. 727 (D. Md. 1978)** Class action brought by entire prison population, consisting of convicted felons who had committed "the most serious crimes." *Id.* at 728.
13.	***Newman v. Alabama*, 349 F. Supp. 278, 284 (M.D. Ala. 1972)** "There is a degree of neglect of basic medical needs of prisoners that could justly be called 'barbarous' and 'shocking to the conscience.'" *Id.* at 281.
14.	***Palmigiano v. Garrahy*, 443 F. Supp. 956, 975-76 (D.R.I. 1977)** "Together with the other unsanitary and dangerous conditions already detailed . . . [t]he grossly inadequate system of medical care, including psychiatric care, afforded inmates is part of the intolerable totality of conditions at the ACL which, as the Court has found, violates inmates' Eighth and Fourteenth Amendment rights." *Id.* at 983.
15.	***Ramos v. Lamm*, 639 F.2d 559, 577-78 (10th Cir. 1980)** Class action on behalf of "all persons who are now or in the future may be incarcerated in the maximum security unit of the Colorado State Penitentiary at Canon City, Colorado." *Id.* at 562.

	Cases Challenging General Prison Conditions
16.	***Ruiz v. Estelle*, 503 F. Supp. 1265 (S.D. Tex. 1980)** Class action on behalf of all past, present, and future inmates of the Texas Department of Corrections (25,575 inmates). *Id.* at 1274-75. Plaintiffs alleged "systemic constitutional violations" including "a variety of conditions and practices in TDC prisons violate the eighth and fourteenth amendments to the Constitution of the United States . . . [such as] overcrowding, security and supervision, health care, discipline, access to the courts, and other general conditions of confinement." *Id.* at 1276-77.
17.	***Sykes v. Kreiger*, 451 F. Supp. 421, 426 (N.D. Ohio 1975)** Inmates sought wide variety of rights, including counsel-substitute for disciplinary hearings, mail rights in isolation, and additional rights in connection with visitation and telephone calls. *Id.* at 423.
18.	***Tillery v. Owens*, 719 F. Supp. 1256, 1302-03 (W.D. Pa. 1989), *aff'd*, 907 F.2d 418 (3d Cir. 1990)** "[W]e find that nearly every aspect of SCIP inadequate, falling far below constitutional standards. In fact . . . we might very well order that SCIP be closed immediately; it is an overcrowded, unsanitary, and understaffed fire trap." 719 F. Supp. at 1259.
19.	***Wellman v. Faulkner*, 715 F.2d 269, 272-73 (7th Cir. 1983)** Court found "evidence of general systemic deficiencies to establish that there is deliberate indifference to serious medical needs . . ." and deficient psychiatric care. *Id.* at 272.

Cases Challenging General Prison Conditions	
20.	***Williams v. Edwards*, 547 F.2d 1206, 1217 (5th Cir. 1977)** Original complaint alleged racial discrimination against minority inmates and that "conditions at the prison violated the eighth and fourteenth amendment rights of the prison population as a whole." *Id.* at 1208. Affirmed district court finding that totality of conditions violated Eighth Amendment. *Id.* at 1211. Affirmed decision that level of medical care violated Eighth Amendment and due process clause of the Fourteenth Amendment. *Id.* at 1218-19. Medical care entirely deficient, *e.g.*, pharmacist not trained or licensed, dental clinic not inspected or accredited, "filthy" emergency equipment, unsupervised inmates performing sutures, physical therapy department whirlpool occupied by fish being kept fresh prior to eating them. *Id.* at 1215-19.

TABLE II

	Cases Not Determined On Their Merits
1.	***Bee v. Greaves*, 744 F.2d 1387 (10th Cir. 1984)** No constitutional violation found; remanded for determination after application of balancing test.
2.	***Bonner v. Arizona Dep't of Corrs.*, 714 F. Supp. 420 (D. Ariz. 1989), *on remand from Bonner v. Lewis*, 857 F.2d 559 (9th Cir. 1988)** Denied defendant's motion for summary judgment.
3.	***Bonner v. Lewis*, 857 F.2d 559 (9th Cir. 1988)** Reversed grant of summary judgment to defendant.
4.	***Cummings v. Roberts*, 628 F.2d 1065, 1068 (8th Cir. 1980)** Reversed summary judgment and remanded.
5.	***Doe v. Coughlin*, 697 F. Supp. 1234 (N.D.N.Y. 1988)** Preliminary injunction.
6.	***Duran v. Anaya*, 642 F. Supp. 510 (D.N.M. 1986)** Preliminary injunction to prevent future constitutional violation.
7.	***Eng v. Smith*, 849 F.2d 80 (2d Cir. 1988)** Preliminary injunction.
8.	***Langley v. Coughlin*, 715 F. Supp. 522, 540 (S.D.N.Y. 1989)** No decision on the merits—denial of summary judgment. Court specifically noted that plaintiffs would need to demonstrate facts to support their claims. *Id.* at 560.

Cases Not Determined On Their Merits	
9.	***Lee v. McManus*, 543 F. Supp. 386 (D. Kan. 1982)** Preliminary injunction.
10.	***Mackey v. Procunier*, 477 F.2d 877 (9th Cir. 1973)** Reversing grant of FED. R. CIV. P. 12(b)(6) motion to dismiss.
11.	***Maclin v. Freake*, 650 F.2d 885, 889 (7th Cir. 1981)** Reversing summary judgment.
12.	***Negron v. Preiser*, 382 F. Supp. 535 (S.D.N.Y. 1974)** Preliminary injunction. "[T]he Court at this time declines to hold that the conditions of the isolation cells violate the Eight[h] Amendment." *Id.* at 543.
13.	***Yarbaugh v. Roach*, 736 F. Supp. 318 (D.D.C. 1990)** Granted preliminary injunction requiring adequate medical treatment.
14.	***Young v. Harris*, 509 F. Supp. 1111, 1113 (S.D.N.Y. 1981)** Denied summary judgment to defendants.

TABLE III

	Cases That Conflate Universal Deficiencies In Medical Or Psychiatric Care With "Discrimination" On The Basis Of Disability
1.	***Balla v. Idaho State Bd. of Corr.*, 595 F. Supp. 1558, 1569 (D. Idaho 1984)** "Eighth Amendment violated where psychiatric care at prison is 'almost nonexistent.'" (U.S. Br. 20a-21a) "State violated Eighth Amendment by providing '[l]ittle or no psychiatric care or assistance' to inmates with serious mental illnesses." (Goodman Br. 30 n.15)
2.	***Battle v. Anderson*, 376 F. Supp. 402, 415 (E.D. Okl. 1974)** "Though approximately one half of the average in-patient population at the penitentiary is hospitalized for psychiatric reasons, there is no professional psychiatric staff available for treatment on a regular basis. A visiting psychiatrist makes weekly visits pursuant to an informal agreement, but he has not assumed responsibility for the care of these patients. The only 'treatment' available at the penitentiary consists of temporary relief from 'distress' through sedation." (U.S. Br. 23a-24a) "[I]nadequate mental health care in state prison violated Eighth Amendment" (Goodman Br. 30 n.15)

	Cases That Conflate Universal Deficiencies In Medical Or Psychiatric Care With "Discrimination" On The Basis Of Disability
3.	***Cody v. Hilliard*, 599 F. Supp. 1025, 1058-59 (D.S.D. 1984), *aff'd*, 799 F.2d 447 (8th Cir. 1986), *rev'd in part*, 830 F.2d 912 (8th Cir. 1987) (en banc)** Trial court found, and Eighth Circuit affirmed, finding of **no equal protection violation** in connection with protective custody inmates' limited access to opportunities **because of legitimate balancing against rational basis for restrictions**. 599 F. Supp. at 1055. Both courts initially held double-celling there, as well as in general population, constitutionally barred, *id.* at 1055; 799 F.2d at 450, but Eighth Circuit reversed this holding on rehearing *en banc*, 830 F.2d at 914, finding that "[t]he record in this case falls far short of supporting the District Court's conclusion . . . [T]here is no constitutional basis for the District Court's remedial order with respect to double-celling." *Id.*
4.	***Duran v. Anaya*, 642 F. Supp. 510 (D.N.M. 1986)** Court granted preliminary injunction to *prevent* proposed staff reductions that would probably not permit maintenance of minimal constitutional standards in medical care, mental health care, and security. Court concerned itself with prison's "obligation to provide a level of medical care that is reasonably designed to meet the routine and emergency health care needs of prisoners . . . with respect to medical care, dental care, and psychiatric care." *Id.* at 575.

	Cases That Conflate Universal Deficiencies In Medical Or Psychiatric Care With "Discrimination" On The Basis Of Disability
5.	***Eng v. Smith*, 849 F.2d 80 (2d Cir. 1988)** Affirming grant of preliminary injunction where district court had sufficient evidence of "systemic deficiencies in Attica's mental health system" but specifically declined to decide whether problems met "deliberate indifference" standard. *Id.* at 82-83.
6.	***Inmates of Occoquan v. Barry*, 717 F. Supp. 854 (D.D.C. 1989)** Class action claiming Eighth Amendment violations and seeking declaratory and injunctive relief for "excessive inmate population; deficiencies in environmental health and safety; food services; fire safety; medical and dental services; and mental health care." *Id.* at 854.
7.	***Inmates of the Allegheny County Jail v. Peirce*, 487 F. Supp. 638 (W.D. Pa. 1980)** "[L]ack of mental health treatment being given to mentally ill inmates in a county jail amounted to deliberate indifference." (U.S. Br. 22a)
8.	***James v. Wallace*, 382 F. Supp. 1177 (M.D. Ala. 1974)** "[D]enying defendants' motion to dismiss suit alleging that prisoners had been refused the opportunity to rehabilitate themselves, that prisoners had been arbitrarily and capriciously assigned to units which have no treatment facilities for mental or physical disabilities, and that unreasonable restrictions had been placed on prisoners' visitation rights." (U.S. Br. 23a)

	Cases That Conflate Universal Deficiencies In Medical Or Psychiatric Care With "Discrimination" On The Basis Of Disability
9.	***Laaman v. Helgemoe*, 437 F. Supp. 269 (D.N.H. 1977)** "[P]sychiatric treatment at prison was 'basically nonexistent' in spite of the fact that as much as *40%* of inmate population needed intensive psychiatric treatment." (U.S. Br. 23a) Court specifically noted that information about mental illness at this prison "was based on national statistics concerning prison populations in general and not upon specific information concerning NHSP." *Id.* at 276 n.1.
10.	***Langley v. Coughlin*, 715 F. Supp. 522, 540 (S.D.N.Y. 1989)** "[T]riable issues of fact existed as to whether there had been inadequate medical care for the serious needs of mentally ill inmates in violation of the Eighth Amendment." (U.S. Br. 19a)
11.	***Lightfoot v. Walker*, 486 F. Supp. 504 (S.D. Ill. 1980)** "[H]ealth care system and environmental conditions and practices at state prison violated Eighth and Fourteenth Amendments where they led to unnecessary suffering due to deliberate indifference and misadministration of prison officials which was so gross as to be deemed wilful." (U.S. Br. 22a)
12.	***Mitchell v. Untreiner*, 421 F. Supp. 886, 891 (N.D. Fla. 1976)** "Eighth Amendment violation where no psychological or psychiatric treatment available for inmates with mental illness." (Goodman Br. at 30 n.15)

Cases That Conflate Universal Deficiencies In Medical Or Psychiatric Care With "Discrimination" On The Basis Of Disability	
13.	***Nelson v. Collins*, 455 F. Supp. 727 (D. Md. 1978)** "Eighth Amendment violated when prison confined mentally ill inmates to isolation cells where they did not have adequate access to needed psychiatric or other medical treatment." (U.S. Br. 22a)
14.	***Newman v. Alabama*, 349 F. Supp. 278, 284 (M.D. Ala. 1972)** "The fate of those many prisoners who are mentally ill or retarded deserves special mention. Mental illness and mental retardation are the most prevalent medical problems in the Alabama prison system. It is estimated that approximately 10 percent of the inmates are psychotic and another 60 percent are disturbed enough to require treatment. To diagnose and treat these almost 2400 inmates, the Board of Corrections employs one clinical psychologist, who works one afternoon each week at the [Medical and Diagnostic Center]. There are no psychiatrists, social workers, or counselors on the staff. Severe, and sometimes dangerous, psychotics are regularly placed in the general population. If they become violent, they are removed to lockup cells which are not equipped with restraints or padding and where they are unattended. While some do obtain interviews with qualified medical personnel and a few are eventually transferred for treatment to a state mental hospital, the large majority of mentally disturbed prisoners receive no treatment whatsoever. It is tautological that such care is constitutionally inadequate." (U.S. Br. 24a-25a) "Eighth Amendment violation where 'the large majority of mentally disturbed inmates receive no treatment whatsoever.'" (Goodman Br. 30 n.15)

	Cases That Conflate Universal Deficiencies In Medical Or Psychiatric Care With "Discrimination" On The Basis Of Disability
15.	***Palmigiano v. Garrahy*, 443 F. Supp. 956, 975-76 (D.R.I. 1977)** "The deliberate indifference displayed by the defendants to the serious medical needs of drug dependant inmates leads to unnecessary and inevitable suffering." (U.S. Br. 22a-23a) "[I]nadequate mental health care in state prison violated Eighth Amendment." (Goodman Br. 30 n.15)
16.	***Ramos v. Lamm*, 639 F.2d 559, 577-78 (10th Cir. 1980)** "[D]enial of adequate mental health care, resulting in suffering, suicides, and self mutilation by inmates violated Eighth Amendment." (Goodman Br. 30 n.15.)
17.	***Tillery v. Owens*, 719 F. Supp. 1256, 1302-03 (W.D. Pa. 1989), *aff'd*, 907 F.2d 418 (3d Cir. 1990)** "[P]rison officials showed deliberate indifference to inmates' medical, dental, and psychiatric care needs, in violation of the Eighth Amendment, where, due to overcrowding, officials had failed to provide adequate staffing and equipment, and failed to maintain an environment conducive to treatment of serious medical illness." (U.S. Br. 19a) "[I]nadequate care of 'serious mental illness' violated Eighth Amendment." (Goodman Br. 30 n.15)
18.	***Wellman v. Faulkner*, 715 F.2d 269, 272-73 (7th Cir. 1983)** "[D]enial of adequate psychiatric care to inmates with mental illness violated Eighth Amendment." (Goodman Br. 30 n.15)

Cases That Conflate Universal Deficiencies In Medical Or Psychiatric Care With "Discrimination" On The Basis Of Disability	
19.	***Williams v. Edwards*, 547 F2d 1206, 1217 (5th Cir. 1977)** "[U]pholding finding of Eighth Amendment violations where prison provided no mental health care despite finding that 40% of inmates would benefit from psychiatric treatment." (U.S. Br. 8a)

TABLE IV

Cases Involving Non-Disabled Inmates Subjected To Like Conditions	
1.	***Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556 (1st Cir. 1988)** Space per prisoner was 15.5 sq. ft. *Id.* at 558.
2.	***Inmates of Occoquan v. Barry*, 717 F. Supp. 854 (D.D.C. 1989)** Court found Eighth Amendment violations "in the areas of sanitation, bathroom facilities, fire safety, health care, and staffing." *Id.* at 869. Bathrooms had "slime oozing down the walls, stalactites hanging from the ceiling, thick soap scum on the walls and floors, and sewer water dripping into toilets," and "neither proper cleaning supplies nor cleaning tools are provided." *Id.* at 866. Finding "systemic" problems with toilets, noting that "[n]umerous toilets did not work and leaking pipes were found throughout the . . . [f]acility." *Id.* at 856.
3.	***Lightfoot v. Walker*, 486 F. Supp. 504 (S.D. Ill. 1980)** Some prisoners double-celled with 18 to 32 square feet of space per inmate. *Id.* at 510.

Cases Involving Non-Disabled Inmates Subjected To Like Conditions	
4.	***Mitchell v. Untreiner*, 421 F. Supp. 886, 891 (N.D. Fla. 1976)** Court held that "the punitive and inhumane conditions of confinement within the Escambia County Jail clearly violate inmates' rights under the First, Fourth, Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments . . . The totality of circumstance of confinement . . . and the sub-human level of existence imposed there violates all civilzed concepts of human rights." *Id.* at 893, 896. Jail so crowded that "Mitchell, a fifteen year old juvenile male, had been . . . incarcerated awaiting trial with other juvenile males in a cell constructed to sleep three persons but which housed as many as eleven persons . . . One 8' x 8' four bed cell sometimes housed as many as six inmates necessitating that two of them sleep on the floor next to the toilet, sometimes without a mattress." *Id.* at 889. "Indigent inmates are not provided with the basic necessities of hygiene . . . Maintaining sanitation of the cells is left up to the inmates . . . Mice and roaches are infested throughout the building." *Id.* at 889.
5.	***Nelson v. Collins*, 455 F. Supp. 727 (D. Md. 1978)** Class action brought by entire prison population, consisting of convicted felons who had committed "the most serious crimes," *id.* at 728, seeking injunctive relief for overcrowding. Two inmates per 44 sq. ft. cell; only one inmate could move around at a time. *Id.* at 734. Court ordered defendants to seek solutions for overcrowding, found it violates Eighth Amendment. *Id.* at 730-31.

Cases Involving Non-Disabled Inmates Subjected To Like Conditions	
6.	***Palmigiano v. Garrahy*, 443 F. Supp. 956, 975-76 (D.R.I. 1977)** "Plumbing throughout Maximum is unsanitary, inadequate, and an imminent danger to public health . . . Only cold water is available in inmate cells . . . Pipes are not equipped with vacuum breakers, creating an ever-present danger that waste water will back up into the fresh water system, even in the food preparation area . . . The damp conditions in the service areas are an ideal breeding ground for the swarming cockroaches, which exist in all stages of development . . . In the lavatories, the Court observed large pools of standing water on the floor, and apparently this is always present. There was a stench of urine coming from this water. The shower areas were filthy, covered with mold and mildew on the floors and the walls. Glass, trash, and dead cockroaches are everywhere on the shower floors." *Id.* at 961.

Cases Involving Non-Disabled Inmates Subjected To Like Conditions	
7.	***Ramos v. Lamm*, 639 F.2d 559, 577-78 (10th Cir. 1980)** "[I]n some instances inmates are not provided with enough cleaning supplies to allow them to adequately clean their own cells." *Id.* at 570. Court found inadequate ventilation, stagnant air, excessive mold and fungus growth, and rodent and insect infestation. *Id.* at 569. Upheld finding that "conditions in the food service areas . . . fail to meet any known public health standards." *Id.* at 570-71. Upheld finding that "the State has failed to reasonably protect inmates from constant threats of violence and assaults from other inmates and that this failure violates the inmates' constitutional rights under the Eighth Amendment." *Id.* at 574.
8.	***Ruiz v. Estelle*, 503 F. Supp. 1265 (S.D. Tex. 1980)** In typical cells, "[t]he usable, unobstructed space in the cell amounts to an aera approximately seven and one-half feet long and three feet wide, totaling 22.5 square feet. So cramped is such a cell that two standing persons must squeeze by each other to pass, and an average man can stand in the center of the cell and touch both walls with outstretched arms . . . . [I]nmates assigned to these forty-five square foot TDC cells can do little more than sit or lie on their bunks or the floor, or use the sanitary facilities." *Id.* at 1278. "Occasionally, four- and sometimes even five-inmates are assigned to one cell . . . . With five inmates, three must sleep on the floor, squeezed between the bars in front and the toilet in the rear of the cell. Inmates have been compelled to endure this latter type of confinement for days or even weeks at a time . . . ." *Id.*

Cases Involving Non-Disabled Inmates Subjected To Like Conditions	
9.	***Sykes v. Kreiger*, 451 F. Supp. 421, 426 (N.D. Ohio 1975)** Crowding conditions provide between 13 and 35 sq. ft. and 140.2 cubic ft. sleeping area per inmate. 451 F. Supp. at 423. Found 5th and 14th Amendment violations as a result of crowding. *Id.* at 424.
10.	***Tillery v. Owens*, 719 F. Supp. 1256, 1302-03 (W.D. Pa. 1989), *aff'd*, 907 F.2d 418 (3d Cir. 1990)** "[W]e find that nearly every aspect of SCIP inadequate, falling far below constitutional standards. In fact . . . we might very well order that SCIP be closed immediately; it is an overcrowded, unsanitary, and understaffed fire trap." *Id.* at 1259. Inmates double-celled in 8x7 cells. In some, "inmates . . . can do little more than lie or sit on their bunks or desks." *Id.* at 1264.
11.	***Wellman v. Faulkner*, 715 F.2d 269, 272-73 (7th Cir. 1983)** Found unconstitutional overcrowding. *Id.* at 274. Some inmates spend 22-23½ hours per day in cells with one 17 square feet of floor space. *Id.*
12.	***Williams v. Edwards*, 547 F.2d 1206, 1217 (5th Cir. 1977)** Remanded crowding claims. *Id.* at 1214-15. Normal cell size was 6 x 8 feet in some cases. *Id.* at 1215.

TABLE V

	Cases Involving Federal Or Local Government Facilities Rather Than State Facilities
1.	***Bee v. Greaves*, 744 F.2d 1387 (10th Cir. 1984)** Pretrial detainee in Salt Lake County Jail. *Id.* at 1389.
2.	***Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556 (1st Cir.)** Arecibo District Jail. *Id.* at 558.
3.	***Cummings v. Roberts*, 628 F.2d 1065, 1068 (8th Cir. 1980)** Pretrial detainee at St Louis County Jail. *Id.* at 1066.
4.	***Inmates of the Allegheny County Jail v. Peirce*, 487 F. Supp. 638 (W.D. Pa. 1980)** Allegheny County Jail. *Id.* at 639.
5.	***Johnson v. Hardin County*, 908 F.2d 1280, 1284 (6th Cir. 1990)** Hardin County Detention Center, Kentucky. Court specifically found evidence insufficient to show that county, rather than individual officers, were responsible for treatment. *Id.* at 1285-87.
6.	***LaFaut v. Smith*, 834 F.2d 389 (4th Cir. 1987)** Federal Correctional Institution, Butner, North Carolina. *Id.* at 389.
7.	***Leach v. Shelby County Sheriff*, 891 F.2d 1241, 1243-44 (6th Cir. 1989)** Shelby County Jail. Tennessee; "Leach's suit against the Mayor and the Sheriff of Shelby County in their official capacities is, therefore, essentially and for all purposes, a suit against the County itself." *Id.* at 1241.

Cases Involving Federal Or Local Government Facilities Rather Than State Facilities	
8.	***Littlefield v. Deland*, 641 F.2d 729 (10th Cir. 1981)** Pretrial detainee at Salt Lake City County Jail. *Id.* at 730-31.
9.	***Lynch v. Baxley*, 744 F.2d 1452 (11th Cir. 1984)** County jails. *Id.* at 1454.
10.	***Mandel v. Doe*, 888 F.2d 783 (11th Cir. 1989)** Inmate at a "county road prison" in Escambia County, Florida. *Id.* at 785.
11.	***Miranda v. Munoz*, 770 F.2d 255, 259 (1st Cir. 1985)** Pretrial detainee at Arecibo District Jail. *Id.* at 257.
12.	***Mitchell v. Untreiner*, 421 F. Supp. 886, 891 (N.D. Fla. 1976)** Escambia County Jail, Florida. *Id.* at 888.
13.	***Mullen v. Smith*, 738 F.2d 317, 318 (8th Cir. 1984)** Federal Correctional Institution in El Reno, Oklahoma. *Id.* at 317.
14.	***Sykes v. Kreiger*, 451 F. Supp. 421, 426 (N.D. Ohio 1975)** Class action regarding variety of conditions in Cuyahoga County Jail, brought on behalf of "persons confined at Cuyahoga County Jail . . . for reasons other than as punishment resulting from a conviction of a criminal offense." *Id.* at 423.
15.	***Thompson v. City of Portland*, 620 F. Supp. 482, 485-87 (D. Me. 1985)** City of Portland police and county jail. *Id.* at 484-85.

Cases Involving Federal Or Local Government Facilities Rather Than State Facilities	
16.	***Yarbaugh v. Roach*, 736 F. Supp. 318 (D.D.C. 1990)** D.C. Detention Facility Infirmary. *Id.* at 318.

TABLE VI

	Cases Cited By Petitioners And Not Included In Foregoing Categories
1.	***Burchett v. Bower*, 355 F. Supp. 1278 (D. Ariz. 1973)** Summary judgment granting plaintiff a right to hearing before terminating mental treatment and transferring him back to prison. *Id.* at 1281.
2.	***Delafose v. Manson*, 385 F. Supp. 1115 (D. Conn. 1974)** "[P]rison practice of paying inmates who were receiving treatment for physical ailments *38* cents per day hospital pay while denying such payment to those receiving treatment for mental ailments denied equal protection to those receiving treatment for mental illness." (U.S. Br. 23a) (More similar to Title I employment-discrimination claims.)
3.	***Flakes v. Percy*, 511 F. Supp. 1325 (W.D. Wis. 1981)** Suit regarding conditions in hospital that housed convicted persons, persons incompetent to stand trial, and civilly committed persons. *Id.* at 1326. Some wards had no toilets in cells and patients used chamber pots when locked in. *Id.* at 1327-29. Court held violation of Eighth Amendment to lock a person in a cell without a toilet and that Eighth Amendment applied to hospital. *Id.* at 1332-34. Court also found substantive due process under Fourteenth Amendment guarantees minimally adequate treatment to an involuntarily confined person with mental illness. *Id.* at 1339. Found violation of substantive due process rights of plaintiff class. *Id.* at 1340.

Cases Cited By Petitioners And Not Included In Foregoing Categories	
4.	***Knecht v. Gillman*, 488 F.2d 1136 (8th Cir. 1973)** Enjoined use of injections that induced vomiting as punishment or disciplinary measure in State mental institution. Population included civilly committed as well as prisoners. *Id.* at 1138. Institution at issue was the Iowa Security Medical Facility, not a prison. *Id.* (quoting Iowa Code § 223.1 (1973)).
5.	***Maynard v. New Jersey*, 719 F. Supp. 292 (D.N.J. 1989)** Court held Eleventh Amendment barred claim against State for failure to diagnose and treat inmate with AIDS. *Id.* at 296. Granted motion to dismiss as to State but denied as to prison medical personnel. *Id.* at 296-97.

	Cases Cited By Petitioners And Not Included In Foregoing Categories
6.	***Negron v. Ward*, 458 F. Supp. 748 (S.D.N.Y. 1978)** Plaintiff-inmates were confined in the Mattewan State Hospital for the Criminally Insane. *Id.* at 749. Following an altercation, plaintiffs were removed from their open ward and confined in a secluded ward. *Id.* at 750. Jury determined that this ward transfer was for the purpose of punishment. *Id.* at 761. Not a claim for discrimination. Plaintiffs were mentally ill inmates housed among other mentally ill inmates who complained at being isolated for disciplinary reasons. Does not establish constitutional violations that resulted from intentional discrimination on the basis of disability—jury specifically found that inmates were secluded for punishment. *Id.* at 760-61. Plaintiffs complained that they were deprived of their right to treatment without due process. Jury found in favor of plaintiffs and awarded compensatory damages. Court denied motion for JNOV, explaining that plaintiffs were entitled to a hearing before being deprived of their treatment. *Id.* at 755. Court held that plaintiffs had an entitlement to psychiatric treatment unimpeded by punitive confinement imposed without due process. *Id.* at 759.
7.	***Parrish v. Johnson*, 800 F.2d 600, 605 (6th Cir. 1986)** Sixth Circuit reversed and remanded trial court's award of nominal damages for constitutional violations for one prison guard's cruelty to two paraplegic inmates. *Id.* at 602. Declined to evaluate one inmate's claim under Fourteenth Amendment because "the Fourteenth Amendment provides a prisoner with no greater protection than the Eighth Amendment." *Id.* at 604 n.5.

Cases Cited By Petitioners And Not Included In Foregoing Categories	
8.	***Sites v. McKenzie*, 423 F. Supp. 1190 (N.D. W. Va. 1976)** Found due process safeguards in statute used to commit prisoners to mental institution to be "procedurally and substantively deficient in comparison to the protections . . . under the civil commitment statute." *Id.* at 1193. No rational basis for distinguishing between civilly insane and criminally insane. *Id.* at 1194. Equal protection violation also found where prisoners in mental hospitals did not have opportunity for parole at end of sentence unless they had recovered. *Id.* at 1194-95. Found violation of Rehabilitation Act where plaintiffs were executed from vocational rehabilitation opportunities because of mental illness. *Id.* at 1197. Not a claim for disability discrimination. Here, mentally disabled inmates were seeking treatment equal to that of civilly committed mentally ill, or same treatment as similarly disabled non-prisoners.
9.	***Talley v. Stephens*, 247 F. Supp. 683, 687 (E.D. Ark. 1965)** Sought injunction against summary corporal punishment. *Id.* at 685, 687. Inmates forced to harvest crops and subjected to summary whipping if work insufficient by subjective and unrestrained judgment of assistant wardens. *Id.* at 687-88. Not a claim for disability discrimination. Court noted that two plaintiffs were "laboring under serious physical handicaps [and] that their physical condition has been classified as 'poor' by the prison physician" (*id.* at 687) but did not specify further. Plaintiffs also claimed denial of access to the courts (*id.* at 690-91) and denial of "needed medical attention: (*id.* at 685).

Cases Cited By Petitioners And Not Included In Foregoing Categories	
10.	***Vitek v. Jones*, 445 U.S. 480 (1980)** Held that prisoners are entitled to due process protections prior to involuntary transfer to mental hospital. *Id.* at 487-96. No claim that prisoners were being transferred because of intentional, irrational State discrimination.
11.	***Waldrop v. Evans*, 681 F. Supp. 840 (M.D. Ga. 1988)** Mentally ill inmate rendered himself totally blind and without testicles as a result of a series of self-mutilatory acts while in prison. *Id.* at 844. Had seen a series of prison doctors and mental health professionals and had received treatment along the way. *Id.* at 842-44. Court granted summary judgment to nine individual defendants, including some health professionals and the high-ranking prison administrators that had been named, as to plaintiff's deliberate indifference claims. *Id.* at 862. Denied summary judgment to two of the doctors, finding fact questions as to treatment decisions they made. *Id.* at 854-55. Court specifically found that psychiatric staffing was adequate. *Id.* at 849. In explaining why Commissioner and Superintendent could not be found deliberately indifferent, court specifically found that "GDCC was adequately staffed with medical professionals including three staff physicians and one consulting psychiatrist." *Id.* at 849.

TABLE VII

	Case Analysis
1.	***Balla v. Idaho State Bd. of Corr.*, 595 F. Supp. 1558, 1569 (D. Idaho 1984)** *PETITIONERS' DESCRIPTION*—"Eighth Amendment violated where psychiatric care at prison is "almost nonexistent" (U.S. Br. 20a-21a.) "State violated Eighth Amendment by providing '[l]ittle or no psychiatric care or assistance' to inmates with serious mental illnesses." (Goodman Br. 30 n.15) *COMMENTS*—Found deficiencies in nutrition, medical care, psychiatric care, and adequacy of clothing. 595 F. Supp. at 1575-78. Also found due process violations in connection with procedures for disciplinary procedures. *Id.* at 1582. Noted that three individuals had medical conditions that resulted in special dietary requirements that were not being met. *Id.* at 1565. Court ordered these needs to be met. *Id.* at 1574-75.

	Case Analysis
2.	***Battle v. Anderson*, 376 F. Supp. 402, 415 (E.D. Okl. 1974)** *PETITIONERS' DESCRIPTION*—"Though approximately one half of the average in-patient population at the penitentiary is hospitalized for psychiatric reasons, there is no professional psychiatric staff available for treatment on a regular basis. A visiting psychiatrist makes weekly visits pursuant to an informal agreement, but he has not assumed responsibility for the care of these patients. The only 'treatment' available at the penitentiary consists of temporary relief from 'distress' through sedation." (U.S. Br. 23a-24a) "[I]nadequate mental health care in state prison violated Eighth Amendment" (Goodman Br. 30 n.15) *COMMENTS*—Prison conditions post-riot. Guards used mace and tear gas for discipline. 376 F. Supp. at 413-15, 423. Court found "systemic medical deficiencies." *Id.* at 416. Plaintiffs claimed, *inter alia*, that prison failed to provide adequate law library, denied opportunity for religious gatherings, refused to provide meals that adhered to religious beliefs, and restricted reading materials. *Id.* at 407-08. Court denied monetary damages. *Id.* at 420.

Case Analysis	
3.	***Bee v. Greaves*, 744 F.2d 1387 (10th Cir. 1984)** *PETITIONERS' DESCRIPTION*—"[G]enuine issue of material fact as to whether an emergency existed and as to whether forcible medication for an indefinite period was an exaggerated response, where pretrial detainee claimed he was forced to take antipsychotic drug thorazine against his will" (U.S. Br. 7a) *COMMENTS*—Hallucinating inmate first demanded—and received—Thorazine, then after taking it voluntarily for two months, refused it. 744 F.2d at 1389-90. Jail psychiatrist forced it for purportedly medical reasons. Plaintiff claimed Fourteenth Amendment liberty interest in avoiding forced medication without due process. *Id.* at 1391. Court held that a pretrial detainee has a liberty interest in avoiding unwanted treatment but the liberty interest is not absolute and must be balanced against the State's interests. *Id.* at 1394. Reversed grant of summary judgment and remanded for proper balancing test. *Id.* at 1397.

Case Analysis	
4.	***Bonner v. Arizona Dep't of Corrs.*, 714 F. Supp. 420 (D. Ariz. 1989), *on remand from Bonner v. Lewis*, 857 F.2d 559 (9th Cir. 1988)** *PETITIONERS' DESCRIPTION*—"[D]eaf, mute, and vision impaired inmate denied communication assistance, including in disciplinary proceedings, counseling sessions, and medical treatment" (U.S. Br. 19a) "Due Process Clause requires that "deaf, mute, and vision-impaired inmate" receive an interpreter in disciplinary proceedings against him" (Goodman Br. 18) *COMMENTS*—On remand, court denied defendant's motion for summary judgment as to plaintiff's claim for a qualified sign language interpreter at disciplinary hearings, finding constitutionally protected due process liberty interest. 714 F. Supp. at 425. Also denied summary judgment as to plaintiff's Rehabilitation Act claim. *Id.* at 422-23. Granted summary judgment against plaintiff's claim that he had a due process liberty interest in remaining in general prison population by avoiding protective lockdown, finding that "[s]o long as the conditions of confinement do not violate constitutional norms," plaintiff had "no constitutionally protected liberty interest in assignment to a particular part of the prison." *Id.* at 424-25.

	Case Analysis
5.	***Bonner v. Lewis*, 857 F.2d 559 (9th Cir. 1988)** *PETITIONERS' DESCRIPTION*—"[R]eversing grant of summary judgment to defendant on inmate's Section 504 claim where inmate, who is deaf, mute, and suffers from a severe progressive vision loss, was not provided with a sign-language interpreter for counseling sessions, administrative or disciplinary hearings, or medical appointments" (U.S. Br. 6a) *COMMENTS*—Affirmed summary judgment against deaf inmate's equal protection and Eighth Amendment claims for sign language interpreter at, *inter alia*, disciplinary hearings. 857 F.2d at 565-66. Remanded due process claims to determine whether the statutes and regulations governing protective lockdown created a liberty interest. *Id.* at 564-65. Found *no* equal protection violation and *no* Eighth Amendment violation as to some of inmate's claims. *Id.* at 565-66. Remanded Rehabilitation Act claims because of genuine issues of material fact. *Id.* at 564.
6.	***Burchett v. Bower*, 355 F. Supp. 1278 (D. Ariz. 1973)** *PETITIONERS' DESCRIPTION*—"[A]dministrator of state hospital and director of its maximum security ward had to comply with requirements of due process and equal protection before right of mentally ill state prisoner to treatment at hospital could be terminated" (U.S. Br. 24a) *COMMENTS*— Partial summary judgment granting plaintiff a right to hearing before terminating mental treatment and transferring him back to prison. 355 F. Supp. at 1283. Continued restraining order (previously entered) as permanent injunction against transfer without due process. *Id.*

	Case Analysis
7.	***Cody v. Hilliard*, 599 F. Supp. 1025, 1058-59 (D.S.D. 1984), *aff'd*, 799 F.2d at 447 (8th Cir. 1986), *rev'd in part*, 830 F.2d 912 (8th Cir. 1987) (en banc)** *PETITIONERS' DESCRIPTION*—"[D]enial of adequate mental health care to inmates with 'serious psychiatric needs' violated Eighth Amendment" (Goodman Br. 30 n.15) *COMMENTS*—Class action on behalf of "all persons who are now or will be incarcerated in the South Dakota State Penitentiary . . . or in the Women's . . . Facility." 599 F. Supp. at 1026. Trial court found, and Eighth Circuit affirmed, finding of **no equal protection violation** in connection with protective custody inmates' limited access to opportunities **because of legitimate balancing against rational basis for restrictions**. *Id.* at 1055. Both courts did hold double-celling there as well as in general population constitutionally barred, *id.* at 1055; 799 F.2d at 450, but Eighth Circuit reversed this finding on rehearing *en banc*, 830 F.2d at 914, finding that "[t]he record in this case falls far short of supporting the District Court's conclusion . . . [T]here is no constitutional basis for the District Court's remedial order with respect to double-celling." *Id.*

Case Analysis
"The plaintiff class challenges the constitutionality under the first, fifth, sixth, eighth and fourteenth amendments to the United States Constitution of numerous conditions and practices of confinement." 599 F. Supp. at 1026. Plaintiffs complained about fire protection, ventilation, heating, lack of hot water, lighting, lack of medical and dental care, inadequate mental health care, double-celling, improper milk pasteurization, improper food storage, and various other conditions. *Id.* at 1029. Complained that protective custody inmates are denied equal protection as applied to other inmates because of double-celling in protective custody and because of limited educational and job opportunities. *Id.* at 1054. Prison maintains a "special diet" line but no special line for diabetics, but court notes that "these deficiencies are offset by the reasonable attempts made by the SDSP nurses to educate these diabetic inmates on a one-to-one basis regarding their special diabetic needs" and that "these inmates can make appropriate food selections from either the general or special diet line in order to properly control their diet." *Id.* at 1039. Found that prison "makes adequate provisions" for special dietary needs. *Id.* at 1057. Court found some aspects of medical and psychiatric care deficient. Found totality of conditions violated Eighth and Fourteenth Amendments. *Id.* at 1062. On rehearing *en banc*, Eighth Circuit noted that "the Constitution does not mandate comfortable prisons, and prisons . . . which house persons convicted of serious crimes[] cannot be free of discomfort." 830 F.2d at 916.

	Case Analysis
8.	***Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556 (1st Cir.)** *PETITIONERS' DESCRIPTION*—"Eighth Amendment violated when mentally ill prisoner was housed in a severely overcrowded cell where he was ultimately killed and dismembered by other inmates." (U.S. Br. 6a) *COMMENTS*—Mentally disturbed inmate transferred to extremely overcrowded prison along with 39 other inmates after prison riot. 842 F.2d at 558. He was killed. Not a claim that the State discriminated against plaintiff; injuries came from conduct of other inmates. Space per prisoner was 15.5 sq. ft. *Id.* Claimed injury occurred in Arecibo District Jail. *Id.*
9.	***Cummings v. Roberts*, 628 F.2d 1065, 1068 (8th Cir. 1980)** *PETITIONERS' DESCRIPTION*—"[J]ail inmate's allegation 'that because the defendants failed to give him a wheelchair, he was forced to crawl on the floor' stated Eighth Amendment claim." (Goodman Br. 29 n.14.) *COMMENTS*—Pretrial detainee at St Louis County Jail. 628 F.2d at 1066. Non-disabled inmate being detained for highly publicized scalding death of 2-year old received back injury while in custody and was transferred to protective custody for his safety. *Id.* at 1067. Court reversed grant of summary judgment awarded to defendants and remanded to trial court, finding that defendants' evidence was insufficient to support summary judgment against plaintiff's Eighth Amendment claim for deliberate indifference in connection with medical care for back injury. *Id.* at 1068.

Case Analysis	
10.	***Delafose v. Manson*, 385 F. Supp. 1115 (D. Conn. 1974)** *PETITIONERS' DESCRIPTION*—"[P]rison practice of paying inmates who were receiving treatment for physical ailments *38* cents per day hospital pay while denying such payment to those receiving treatment for mental ailments denied equal protection to those receiving treatment for mental illness." (U.S. Br. 23a) *COMMENTS*—Inmates hospitalized for physical ailments received 38¢ per day "hospital pay," but those hospitalized for mental ailments did not. 385 F. Supp. at 1116-17. (More similar to Title I employment-discrimination claims.)
11.	***Doe v. Coughlin*, 697 F. Supp. 1234 (N.D.N.Y. 1988)** *PETITIONERS' DESCRIPTION*—"[P]reliminary injunction granted in class action seeking to prohibit further implementation of a program involving the involuntary transfer to a separate dormitory of inmates who had tested positive for HIV." (U.S. Br. 19a-20a) *COMMENTS*—Court granted preliminary injunction to HIV-positive inmates to prevent involuntary transfer to HIV ward on privacy grounds. 697 F. Supp. at 1243. Decided on privacy grounds—court specifically noted rejection of same claim when it had been brought under Fourteenth Amendment. *Id.* at 1236.

	Case Analysis
12.	***Duran v. Anaya*, 642 F. Supp. 510 (D.N.M. 1986)** *PETITIONERS' DESCRIPTION*—"[I]nmates were entitled to a preliminary injunction prohibiting implementation of proposed staff reductions with respect to medical care, mental health care, and security, where there was no evidence that staffing reductions of the magnitude contemplated would permit the maintenance of minimal constitutional standards in those areas." (U.S. Br. 20a) *COMMENTS*—Court granted preliminary injunction to *prevent* proposed staff reductions that would probably not permit maintenance of minimal constitutional standards in medical care, mental health care, and security. Court concerned itself with prison's "obligation to provide a level of medical care that is reasonably designed to meet the routine and emergency health care needs of prisoners . . . with respect to medical care, dental care, and psychiatric care." 642 F. Supp. at 575. Court specifically addressed itself to the potential harms to the "routine and emergency" needs of the entire prison population. *Id.*
13.	***Eng v. Smith*, 849 F.2d 80 (2d Cir. 1988)** *PETITIONERS' DESCRIPTION*—"[U]pholding grant of preliminary injunction based on constitutionally inadequate provision of medical care to mentally ill inmates." (U.S. Br. 6a) *COMMENTS*—Affirming grant of preliminary injunction where district court had sufficient evidence of "systemic deficiencies in Attica's mental health system." 849 F.2d at 82-83. Specifically declined to decide whether problems met "deliberate indifference" standard. *Id.*

	Case Analysis
14.	***Flakes v. Percy*, 511 F. Supp. 1325 (W.D. Wis. 1981)** *PETITIONERS' DESCRIPTION*—"[L]ocking persons confined in a maximum security mental hospital, for any significant time, in a cell lacking a flush toilet and wash bowl was cruel and unusual punishment." (U.S. Br. 21a) *COMMENTS*—Suit regarding conditions in Central State Hospital that housed convicted persons, persons incompetent to stand trial, and civilly committed persons. 511 F. Supp. at 1326. Some wards had no toilets in cells and patients used chamber pots when locked in. *Id.* at 1326-29. Court held violation of Eighth Amendment to lock a person in a cell without a toilet and that Eighth Amendment applied to hospital. *Id.* at 1332-34. Court also found that substantive due process under Fourteenth Amendment guarantees minimally adequate treatment to an involuntarily confined person with mental illness. *Id.* at 1339. Found violation of substantive due process rights of plaintiff class. *Id.* at 1340.

	Case Analysis
15.	***Inmates of Occoquan v. Barry*, 717 F. Supp. 854 (D.C.D.C. 1989)** *PETITIONERS' DESCRIPTION*—"[H]ousing inmates with mental health problems with punitive segregation inmates violated the Eighth Amendment." (U.S. Br. 19a) *COMMENTS*—Class action claiming Eighth Amendment violations and seeking declaratory and injunctive relief for "excessive inmate population; deficiencies in environmental health and safety; food services; fire safety; medical and dental services; and mental health care." 717 F. Supp. at 854. Court found Eighth Amendment violations "in the areas of sanitation, bathroom facilities, fire safety, health care, and staffing." *Id.* at 869. Finding "systemic" problems with toilets, noting that "[n]umerous toilets did not work and leaking pipes were found throughout the . . . [f]acility." *Id.* at 856. Bathrooms had "slime oozing down the walls, stalactites hanging from the ceiling, thick soap scum on the walls and floors, and sewer water dripping into toilets," and "neither proper cleaning supplies nor cleaning tools are provided." *Id.* at 866. Court found that housing mentally ill inmates in block with inmates in punitive and administrative segregation, locking them in their cells for 23 hours per day—"because there is nowhere else to put them—and not given any treatment, showed a deliberate indifference to their psychiatric needs. *Id.* at 863-64, 868. Court also found that housing protective custody inmates in same block with punitive segregation inmates violated Eighth Amendment as "beyond the range of their punishment." *Id.* at 867.

Case Analysis	
16.	***Inmates of the Allegheny County Jail v. Peirce*, 487 F. Supp. 638 (W.D. Pa. 1980)** *PETITIONERS' DESCRIPTION*—"[L]ack of mental health treatment being given to mentally ill inmates in a county jail amounted to deliberate indifference." (U.S. Br. 22a) *COMMENTS*—Found that pretrial detainees at Allegheny County Jail are entitled to psychiatric care when needed. 487 F. Supp. at 642-43. Lack of psychiatric care in county jail amounted to deliberate indifference. *Id.* at 643.
17.	***James v. Wallace*, 382 F. Supp. 1177 (M.D. Ala. 1974)** *PETITIONERS' DESCRIPTION*—"[D]enying defendants' motion to dismiss suit alleging that prisoners had been refused the opportunity to rehabilitate themselves, that prisoners had been arbitrarily and capriciously assigned to units which have no treatment facilities for mental or physical disabilities, and that unreasonable restrictions had been placed on prisoners' visitation rights." (U.S. Br. 23a) *COMMENTS*—Class action on behalf of all inmates currently incarcerated in units of the Alabama Correctional Institutions System as a result of felony convictions. 382 F. Supp. at 1178. Class plaintiffs sought declaratory and injunctive relief for prison conditions without adequate treatment, reform, or rehabilitation, claiming this violated their rights under the Eighth and Fourteenth Amendments. *Id.* Court found that State must justify denial of rehabilitation services to some when it has undertaken to provide such services to others. *Id.* at 1181-82.

	Case Analysis
18.	***Johnson v. Hardin County*, 908 F.2d 1280, 1284 (6th Cir. 1990)** *PETITIONERS' DESCRIPTION*—"Eighth Amendment violated when prisoner disabled by mobility impairment was denied prescribed medical care and denied access to a shower for 40 days after injuring himself in a fall." (U.S. Br. 5a) "[D]enial, *inter alia*, of crutches to inmate with a disability violated Eighth Amendment." (Goodman Br. 28 n.14) *COMMENTS*—Hardin County Detention Center, Kentucky. Inmate had leg injuries that impaired his mobility. 908 F.2d at 1282. Jail officials did not make requested accommodations to his impaired mobility. *Id.* at 1282-84. After falling in prison shower, he required medical treatment. *Id.* Jail officials did not adequately provide needed medical treatment. *Id.* Court affirmed jury verdict only as to individual defendants' deliberate indifference, but specifically found that county was not liable because plaintiff had not produced sufficient evidence to show policy or custom of mistreatment. *Id.* at 1285-88.

	Case Analysis
19.	***Kendrick v. Bland*, 541 F. Supp. 21 (W.D. Ky. 1981)** *PETITIONERS' DESCRIPTION*—"[V]iolation of Eighth Amendment where mentally ill and impaired inmates confined to prison's "special needs unit" were subject to unwarranted uses of physical force and brutality by prison guards." (U.S. Br. 21a) *COMMENTS*—Class action brought by prisoners at Kentucky State Penitentiary regarding broad range of conditions, necessitating broad consent decree in areas such as crowding, vocational and educational programs, food service, due process for disciplinary procedures, religion, inmate mail, access to the courts, medical and mental health services, racial discrimination, and coercive informant system led to favoritism of some inmates and abuse (rape, etc.) of others. 541 F. Supp. at 22, 27-49. Disability not a mentioned as a factor in favoritism. Demonstrates availability of existing remedies, as court required defendants to submit plan for correcting deficiencies in handicapped accessibility in accordance with the Rehabilitation Act. *Id.* at 39-40.
20.	***Knecht v. Gillman*, 488 F.2d 1136 (8th Cir. 1973)** *PETITIONERS' DESCRIPTION*—"[A]dministration of drugs that induced vomiting to nonconsenting inmates on the basis of alleged violations of behavior rules constituted cruel and unusual punishment." (U.S. Br. 8a) *COMMENTS*—Enjoined use of injections that induced vomiting as punishment or disciplinary measure in State mental institution. 488 F.2d at 1140-41. Population included civilly committed as well as prisoners. *Id.* at 1138. Institution at issue was the Iowa Security Medical Facility, not a prison. *Id.* (quoting Iowa Code § 223.1 (1973)).

	Case Analysis
21.	***Laaman v. Helgemoe*, 437 F. Supp. 269 (D.N.H. 1977)** *PETITIONERS' DESCRIPTION*—"[P]sychiatric treatment at prison was "basically nonexistent" in spite of the fact that as much as *40%* of inmate population needed intensive psychiatric treatment." (U.S. Br. 23a) *COMMENTS*—Class action on behalf of entire prison population detailing a multitude of deficiencies in conditions at entire facility. 437 F. Supp. at 275. In a 62-page opinion, court entered a 16-category order regarding aspects to be corrected. *Id.* at 325-31. Found medical services and facilities deficient as a whole, and found totality of conditions deficient. *Id.* at 324-25. Court specifically noted that information about mental illness at this prison "was based on national statistics concerning prison populations in general and not upon specific information concerning NHSP." *Id.* at 276 n.1.
22.	***LaFaut v. Smith*, 834 F.2d 389 (4th Cir. 1987)** *PETITIONERS' DESCRIPTION*—"[F]ailure to provide paraplegic inmate with an accessible toilet is cruel and unusual punishment." (U.S. Br. 6a-7a) "[F]ailure to provide appropriate toilet facilities and rehabilitation therapy to inmate with paraplegia violated Eighth Amendment." (Goodman Br. 28 n.14.) *COMMENTS*—Inmate was incarcerated in the **Federal** Correctional Institution, Butner, North Carolina. 834 F.2d at 389. Wheelchair-bound paraplegic was incarcerated with inaccessible toilet facilities. *Id.* at 390. Court held this was deliberate indifference that violated the Eighth Amendment. *Id.* at 394.

	Case Analysis
23.	***Langley v. Coughlin*, 715 F. Supp. 522, 540 (S.D.N.Y. 1989)** *PETITIONERS' DESCRIPTION*—"[T]riable issues of fact existed as to whether there had been inadequate medical care for the serious needs of mentally ill inmates in violation of the Eighth Amendment." (U.S. Br. 19a) "[D]enying state officials' motion for summary judgment on Eighth Amendment claim based, *inter alia*, on 'the failure to screen out from SHU those individuals who, by virtue of their mental condition, are likely to be severely and adversely affected by their placement there.'" (Goodman Br. 32 n.18) *COMMENTS*—Class action brought by all inmates in special housing unit in correctional facility. 715 F. Supp. at 531. Complained that mentally ill inmates were housed together with sane inmates and behavior of mentally ill inmates subjected all inmates to constitutionally impermissible conditions. *Id.* at 531, 543. Subclass of plaintiffs complained of deficient medical treatment. *Id.* Subclass of plaintiffs -- non-disabled inmates complained about having to live with arguably disabled inmates. Court adopted magistrate's report denying summary judgment to defendants and finding triable issues of fact, including possibility of systemic failure of medical care. *Id.* at 539-41. Court specifically noted that plaintiffs would need to demonstrate facts to support their claims. *Id.* at 560. In evaluating individual liability of officials, court noted "[i]t is not open to question that the Eleventh Amendment would bar a claim for money damages against the State itself or its agents." *Id.* at 550.

	Case Analysis
24.	***Leach v. Shelby County Sheriff*, 891 F.2d 1241, 1243-44 (6th Cir. 1989)** *PETITIONERS' DESCRIPTION*—"[C]ounty jail maintained policy of deliberate indifference to serious medical needs of paraplegic inmates in violation of Eighth Amendment where paraplegic inmate was not bathed regularly, was forced to sit in his own urine, and was not given necessary help for bowel movements." (U.S. Br. 6a) "[S]everal days' denial of appropriate mattress, bathing, and catheter supplies to inmate with paraplegia violated Eighth Amendment" (Goodman Br. 28 n.14) *COMMENTS*—Shelby County Jail, Tennessee. 891 F.2d at 1243. Affirmed award of $10,000 to plaintiff against "the Sheriff in his official capacity for policy or custom of deliberate indifference sufficient to establish the liability of the County." *Id.* at 1250. "Leach's suit against the Mayor and the Sheriff of Shelby County in their official capacities is, therefore, essentially and for all purposes, a suit against the County itself." *Id.* at 1241.
25.	***Lee v. McManus*, 543 F. Supp. 386 (D. Kan. 1982)** *PETITIONERS' DESCRIPTION*—"[P]reliminary injunction granted in suit brought by paraplegic inmate alleging that he had received improper medical care in violation of the Eighth Amendment." (U.S. Br. 21a) *COMMENTS*—Petitioner's description accurate; case involved preliminary injunctive relief.

Case Analysis	
26.	***Lightfoot v. Walker*, 486 F. Supp. 504 (S.D. Ill. 1980)** *PETITIONERS' DESCRIPTION*—"[H]ealth care system and environmental conditions and practices at state prison violated Eighth and Fourteenth Amendments where they led to unnecessary suffering due to deliberate indifference and misadministration of prison officials which was so gross as to be deemed wilful." (U.S. Br. 22a) *COMMENTS*—Class action "for the benefit of all prisoners . . . seeking declaratory and injunctive relief [] to stop state prison officials from maintaining an inadequate health care system for the prisoners . . . ." 486 F. Supp. at 505. Prison facility built in 1878. Some prisoners double-celled with 18 to 32 square feet of space per inmate. "Based on the totality of the evidence, the Court finds that these inadequacies result in a health care delivery system so wholly inadequate as to lead to unnecessary suffering to the plaintiff class." *Id.* at 525.

Case Analysis	
27.	***Littlefield v. Deland*, 641 F.2d 729 (10th Cir. 1981)** *PETITIONERS' DESCRIPTION*—"Due Process violation where mentally ill inmate was confined without notice or an opportunity to be heard for 56 days in solitary confinement in a 'strip cell' with no windows, no interior lights, no bunk, no floor covering, no toilet beyond a hole in the floor, no articles of personal hygiene, no opportunity for recreation outside cell, no access to reading materials, and frequently no clothing or bedding material." (U.S. Br. 7a-8a) *COMMENTS*—Found that treating a pretrial detainee in this manner amounted to punishment that could not be constitutionally imposed without a determination of guilt and indicated that, even then, conditions would violate Eighth Amendment. 641 F.2d at 731-32. Found that County had failed to implement an effective procedure to assure that mentally-ill inmates are not kept in such facilities for unreasonable periods of time and found a "policy of indifference." *Id.* at 732.

	Case Analysis
28.	***Lynch v. Baxley*, 744 F.2d 1452 (11th Cir. 1984)** *PETITIONERS' DESCRIPTION*—"State subjected individuals awaiting civil commitment proceedings to unconstitutional conditions of confinement in county jails." (U.S. Br. 7a) *COMMENTS*—County jails, not state prisons. 744 F.2d at 1454. Class action on behalf of non-convict mentally ill individuals awaiting involuntary civil commitment proceedings, challenging their detention in county jails. Completely irrelevant to question whether States discriminate against disabled prisoners. Court specifically distinguished plaintiffs because they were awaiting civil commitment proceedings and therefore not in jail for punishment, explaining: "A court must decide whether the restriction is imposed to punish or whether it is simply an incident of legitimate governmental purpose" and found that the conditions applied to these detainees amounted to punishment and therefore violated due process. *Id.* at 1463.

	Case Analysis
29.	***Mackey v. Procunier*, 477 F.2d 877 (9th Cir. 1973)** *PETITIONERS' DESCRIPTION*—"[F]inding that disabled inmate sufficiently alleged being subjected to cruel and unusual punishment where inmate claimed he received without his consent a "fright drug" that caused him to regularly suffer nightmares and awaken unable to breathe." (U.S. Br. 8a) *COMMENTS*—Reversed grant of FED. R. CIV. P. 12(b)(6) motion to dismiss, where plaintiff inmate had gone voluntarily to state medical facility for electroshock treatment and was given a "fright drug" there without his consent. Court found possibility that prison conducted medical experimentation on plaintiff inmate without consent raised constitutional questions. 477 F.2d at 878.
30.	***Maclin v. Freake*, 650 F.2d 885, 889 (7th Cir. 1981)** *PETITIONERS' DESCRIPTION*—"[C]olorable claim for relief under the Eighth Amendment where paraplegic prisoner alleged that he had received no physical therapy for his condition over a period of some 11 months since he had entered prison." (U.S. Br. 7a) "[R]eversing grant of summary judgment to State prison official in case where inmate with paraplegia claimed that he had been denied any physical therapy for almost a year." (Goodman Br. 30 n.15) *COMMENTS*—Court reversed award of summary judgment to defendant, prison medical administrator, holding that paraplegic inmate stated colorable claim for Eighth Amendment violation by alleging lack of physical therapy for eleven months. 650 F.2d at 889. Also held that lower court should not have denied plaintiff's request for appointed counsel. *Id.*

Case Analysis	
31.	***Mandel v. Doe*, 888 F.2d 783 (11th Cir. 1989)** *PETITIONERS' DESCRIPTION*—"[E]vidence established that physician assistant's treatment of prisoner after he severely injured his leg constituted deliberate indifference to prisoner's serious medical needs." (U.S. Br. 6a) *COMMENTS*—Inmate at a "county road prison" in Escambia County, Florida, jumped off the bed of a work-detail pick-up truck and injured his leg. 888 F.2d at 785. Brought § 1983 action complaining that lack of appropriate medical treatment for injury constituted deliberate indifference. *Id.* at 787.
32.	***Maynard v. New Jersey*, 719 F. Supp. 292 (D.N.J. 1989)** *PETITIONERS' DESCRIPTION*—"[F]amily of deceased inmate who brought suit against prison medical personnel for failure to diagnose and refusal to treat inmate's AIDS stated a viable Section 1983 claim against prison medical personnel." (U.S. Br. 19a) *COMMENTS*—Court held Eleventh Amendment barred claim against State for failure to diagnose and treat inmate with AIDS. 719 F. Supp. at 296. Granted motion to dismiss as to State but denied as to prison medical personnel. *Id.* at 296-97.
33.	***Miranda v. Munoz*, 770 F.2d 255, 259 (1st Cir. 1985)** *PETITIONERS' DESCRIPTION*—"[F]ailure to provide medications for epilepsy, which caused prisoner's death, violated Eighth Amendment." (U.S. Br. 7a) *COMMENTS*—Pretrial detainee at Arecibo District Jail. 770 F.2d at 257.

	Case Analysis
34.	***Mitchell v. Untreiner*, 421 F. Supp. 886, 891 (N.D. Fla. 1976)** *PETITIONERS' DESCRIPTION*—"Eighth Amendment violation where no psychological or psychiatric treatment available for inmates with mental illness." (Goodman Br. 30 n.15) *COMMENTS*—Class action seeking declaratory and injunctive relief for inmates incarcerated in Escambia County Jail, Florida. Court held that "the punitive and inhumane conditions of confinement within the Escambia County Jail clearly violate inmates' rights under the First, Fourth, Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments . . . The totality of circumstance of confinement . . . and the sub-human level of existence imposed there violates all civilized concepts of human rights." 421 F. Supp. at 893, 896. Jail so crowded that "Mitchell, a fifteen year old juvenile male, had been . . . incarcerated awaiting trial with other juvenile males in a cell constructed to sleep three persons but which housed as many as eleven persons . . . One 8' x 8' four bed cell sometimes housed as many as six inmates necessitating that two of them sleep on the floor next to the toilet, sometimes without a mattress." *Id.* at 889. "Indigent inmates are not provided with the basic necessities of hygiene . . . Maintaining sanitation of the cells is left up to the inmates . . . Mice and roaches are infested throughout the building." *Id.* "The Jail is entirely without medical, nursing, psychological, or dental staff on the premises. Jail personnel with only some first aid training arbitrarily decide whether inmates need medical treatment." *Id.* at 890. Also noting lack of psychological or psychiatric treatment, limited visiting hours, censoring of inmate reading materials, absence of legal research materials, lack of exercise and other programs, and insufficient number of isolation cells. *Id.* at 891-93.

	Case Analysis
35.	***Mullen v. Smith*, 738 F.2d 317, 318 (8th Cir. 1984)** *PETITIONERS' DESCRIPTION*—"[I]nmate's allegation that prison officials forcibly removed him from his bed and ordered him to walk—after he had suffered a spinal injury that left him unable to walk—stated a claim for violation of the Eighth Amendment." (Goodman Br. 33 n.21) *COMMENTS*—Prisoner in **Federal** Correctional Institution in El Reno, Oklahoma, prison facility complained of deliberate indifference. 738 F.2d at 317.
36.	***Negron v. Preiser*, 382 F. Supp. 535 (S.D.N.Y. 1974)** *PETITIONERS' DESCRIPTION*—"[P]reliminary injunction issued in suit brought by patient-inmates challenging the constitutionality of the hospital's use of isolation cells." (U.S. Br. 23a) *COMMENTS*—Class action challenging conditions of confinement at Mattewan State Hospital, New York. Court entered injunction only to require extensive record-keeping "to ensure and document that the decision to use the isolation cell is based on explicit criteria, is reviewed at the requisite brief intervals, and is, where possible, supplemented by other forms of treatment," but declined to find their condition violated Eighth Amendment. 382 F. Supp. at 543. Court declined to require specific rules for patient behavior in connection with use of isolation cells, and declined to require a due process type of hearing before imposition of seclusion. *Id.* Preliminary-injunction ruling, not on the merits: "[T]he Court at this time declines to hold that the conditions of the isolation cells violate the Eight[h] Amendment." *Id.*

	Case Analysis
37.	***Negron v. Ward*, 458 F. Supp. 748 (S.D.N.Y. 1978)** *PETITIONERS' DESCRIPTION*—"[S]uperintendent of state prison hospital had a duty to provide psychiatric treatment to patients which could not be withheld as a form of discipline without due process." (U.S. Br. 22a) *COMMENTS*—Plaintiff-inmates were confined in the Mattewan State Hospital for the Criminally Insane. 458 F. Supp. at 749. Following an altercation, plaintiffs were removed from their open ward and confined in a secluded ward. *Id.* at 750. Jury determined that this ward transfer was for the purpose of punishment. *Id.* at 761. Not a claim for discrimination: Plaintiffs were mentally ill inmates housed among other mentally ill inmates who complained at being isolated for disciplinary reasons -- jury specifically found that inmates were secluded for punishment. *Id.* at 760-61. Does not establish constitutional violations that resulted from intentional discrimination on the basis of disability. Plaintiffs complained that they were deprived of their right to treatment without due process. Jury found in favor of plaintiffs and awarded compensatory damages. Court denied motion for JNOV, explaining that plaintiffs were entitled to a hearing before being deprived of their treatment. *Id.* at 755. Court held that plaintiffs had an entitlement to psychiatric treatment unimpeded by punitive confinement imposed without due process. *Id.* at 759.

	Case Analysis
38.	***Nelson v. Collins*, 455 F. Supp. 727 (D. Md. 1978)** *PETITIONERS' DESCRIPTION*—"Eighth Amendment violated when prison confined mentally ill inmates to isolation cells where they did not have adequate access to needed psychiatric or other medical treatment." (U.S. Br. 22a) *COMMENTS*—Class action brought by entire prison population, consisting of convicted felons who had committed "the most serious crimes," 455 F. Supp. at 728, seeking injunctive relief for overcrowding. Two inmates per 44 sq. ft. cell; only one inmate could move around at a time. *Id.* at 734. Court ordered defendants to seek solutions for overcrowding, found it violates Eighth Amendment. *Id.* at 730-31. Court noted "no constitutional right to habilitation or rehabilitation" and found psychiatric treatment met minimal constitutional standards except for isolation cells. *Id.* at 736. Ordered that isolation cells should be used "only for mentally deranged inmates." *Id.* Does not establish that inmates were placed in isolation cells without rational basis.

	Case Analysis
39.	***Newman v. Alabama*, 349 F. Supp. 278, 284 (M.D. Ala. 1972)** *PETITIONERS' DESCRIPTION*—"The fate of those many prisoners who are mentally ill or retarded deserves special mention. Mental illness and mental retardation are the most prevalent medical problems in the Alabama prison system. It is estimated that approximately 10 percent of the inmates are psychotic and another 60 percent are disturbed enough to require treatment. To diagnose and treat these almost 2400 inmates, the Board of Corrections employs one clinical psychologist, who works one afternoon each week at the [Medical and Diagnostic Center]. There are no psychiatrists, social workers, or counselors on the staff. Severe, and sometimes dangerous, psychotics are regularly placed in the general population. If they become violent, they are removed to lockup cells which are not equipped with restraints or padding and where they are unattended. While some do obtain interviews with qualified medical personnel and a few are eventually transferred for treatment to a state mental hospital, the large majority of mentally disturbed prisoners receive no treatment whatsoever. It is tautological that such care is constitutionally inadequate." (U.S. Br. 24a-25a) "Eighth Amendment violation where 'the large majority of mentally disturbed inmates receive no treatment whatsoever.'" (Goodman Br. at 30 n.15) *COMMENTS*—Class action on behalf of all prisoners in Alabama penal system (4000 inmates). "There is a degree of neglect of basic medical needs of prisoners that could justly be called 'barbarous' and 'shocking to the conscience.'" 349 F. Supp. at 281. "Perhaps the most deplorable deprivation [is] the product of the

	Case Analysis
	knowing and intentional mistreatment of sick and injured inmates." *Id.* at 284. Granted extensive and detailed injunction against, *inter alia,* refusal or failure to provide adequate medical care to each inmate. *Id.* at 286-88.
40.	***Palmigiano v. Garrahy*, 443 F. Supp. 956, 975-976 (D.R.I. 1977)** *PETITIONERS' DESCRIPTION*—"The deliberate indifference displayed by the defendants to the serious medical needs of drug dependant inmates leads to unnecessary and inevitable suffering." (U.S. Br. 22a-23a) "[I]nadequate mental health care in state prison violated Eighth Amendment." (Goodman Br. 30 n.15.) *COMMENTS*—Class action on behalf of prisoners in Rhode Island Adult Correctional Institutions regarding broad range of deficient conditions in 100-year-old prison facility. "Together with the other unsanitary and dangerous conditions already detailed . . . [t]he grossly inadequate system of medical care, including psychiatric care, afforded inmates is part of the intolerable totality of conditions at the ACL which, as the Court has found violates inmates' Eighth and Fourteenth Amendment rights." 443 F. Supp. at 983. Ordered relief. "Plumbing throughout Maximum is unsanitary, inadequate, and an imminent danger to public health . . . Only cold water is available in inmate cells . . . Pipes are not equipped with vacuum breakers, creating an ever-present danger that waste water will back up into the fresh water system, even in the food preparation area . . . The damp conditions in the service

	Case Analysis
	areas are an ideal breeding ground for the swarming cockroaches, which exist in all stages of development . . . In the lavatories, the Court observed large pools of standing water on the floor, and apparently this is always present. There was a stench of urine coming from this water. The shower areas were filthy, covered with mold and mildew on the floors and the walls. Glass, trash, and dead cockroaches are everywhere on the shower floors." *Id.* at 961. "Rehabilitation . . . is impossible under the Department's approach . . . ." *Id.* at 966. "[T]he system of medical care delivery at the ACL is inadequate by any accepted standard to meet the inmates' routine and emergency health care needs. " *Id.* at 973.
41.	***Parrish v. Johnson*, 800 F.2d 600, 605 (6th Cir. 1986)** *PETITIONERS' DESCRIPTION*—"[P]rison guard repeatedly assaulted paraplegic inmates with a knife, forced them to sit in their own feces, and taunted them with remarks like 'crippled bastard' and '[you] should be dead.'" (U.S. Br. 7a, 30, 49) "[P]rison guard violated Eighth Amendment when he assaulted inmate with paraplegia, forced him to sit in his own feces, taunted him with a knife, extorted food from him, and verbally abused him." (Goodman Br. 30 n.21) *COMMENTS*—Sixth Circuit reversed and remanded trial court's award of only nominal damages for constitutional violations for one prison guard's cruelty to two paraplegic inmates. Declined to evaluate one inmate's claim under Fourteenth Amendment because "the Fourteenth Amendment provides a prisoner with no greater protection than the Eighth Amendment." 800 F.2d at 604 n.4.

Case Analysis	
42.	***Ramos v. Lamm*, 639 F.2d 559, 577-78 (10th Cir. 1980)** *PETITIONERS' DESCRIPTION*—"[D]enial of adequate mental health care, resulting in suffering, suicides, and self mutilation by inmates violated Eighth Amendment." (Goodman Br. 30 n.15) *COMMENTS*—Class action on behalf of "all persons who are now or in the future may be incarcerated in the maximum security unit of the Colorado State Penitentiary at Canon City, Colorado." 639 F.2d at 562. Upheld finding that "'the blatant inadequacy of health care is perhaps the most appalling' of all the problems . . . and that the State has 'been aware of grave and systemic deficiencies in the medical care delivery system . . . for years'" and that lack of medical and mental health care violated Eighth Amendment. *Id.* at 574-78. "[I]n some instances inmates are not provided with enough cleaning supplies to allow them to adequately clean their own cells." *Id.* at 570. Court found inadequate ventilation, stagnant air, excessive mold and fungus growth, and rodent and insect infestation. *Id.* at 569. Upheld finding that "conditions in the food service areas . . . fail to meet any known public health standards." *Id.* at 570-71. Upheld finding that "the State has failed to reasonably protect inmates from constant threats of violence and assaults from other inmates and that this failure violates the inmates' constitutional rights under the Eighth Amendment." *Id.* at 574. Tenth Circuit set aside trial court's ruling that visitation restrictions were too harsh (*id.* at 578-81), affirmed the trial court's decision that restrictions on prisoners' mail were invalid under the First and Fourteenth Amendments (*id.* at 581-82), and sustained the trial court's ruling that, because of conditions of and regulations in the libraries, and the lack of alternative methods, the State had denied the inmates meaningful access to the courts in violation of the Constitution. *Id.* at 582-84.

	Case Analysis
43.	***Ruiz v. Estelle*, 503 F. Supp. 1265 (S.D. Tex. 1980), *aff'd in part and reversed in part*, 679 F.2d 1115 (5th Cir. 1982)** *PETITIONERS' DESCRIPTION*—"[A]lthough *10-15%* of prison population was mentally retarded, prison did not provide any assistance to such inmates; as a result, mentally retarded inmates were denied access to programs that could lead to early release and to education programs, were subject to more discipline than other inmates, and were more vulnerable to attacks and injuries." (U.S. Br. 21a) "In 1980, the United States District Court for the Southern District of Texas ruled, on the basis of an extensive record, that the Texas Department of Corrections violated the Eighth Amendment rights of inmates with physical disabilities by delaying the provision and maintenance of wheelchairs, hearing aids, and other assistive devices, by refusing to provide wheelchair-accessible cells, and by refusing to provide accessible toilet and shower facilities." (Goodman Br. 27) "Eighth Amendment violation where 'the right of physically handicapped inmates to minimal levels of medical care has been systematically ignored.'" (Goodman Br. 30 n.15) "[F]ailure to protect inmates with mental retardation from abuse and physical harm by other inmates violated Eighth Amendment." (Goodman Br. 32 n.19) "[F]ailure to provide assistance necessary to enable inmates with mental retardation to understand and participate in disciplinary proceedings violated Constitution." (Goodman Br. 33 n.22)

Case Analysis	
	COMMENTS—Class action on behalf of all past, present, and future inmates of the Texas Department of Corrections (25,575 inmates). 503 F. Supp. at 1274-75. Court issued 125-page opinion detailing myriad poor conditions and a number of constitutional violations and issuing decree to address them. Fifth Circuit affirmed in part and reversed in part. Plaintiffs alleged "systemic constitutional violations" including "a variety of conditions and practices in TDC prisons violate the eighth and fourteenth amendments to the Constitution of the United States . . . [such as] overcrowding, security and supervision, health care, discipline, access to the courts, and other general conditions of confinement." *Id.* at 1276-77. In typical cells, "[t]he usable, unobstructed space in the cell amounts to an area approximately seven and one-half feet long and three feet wide, totaling 22.5 square feet. So cramped is such a cell that two standing persons must squeeze by each other to pass, and an average man can stand in the center of the cell and touch both walls with outstretched arms . . . [I]nmates assigned to these forty-five square foot TDC cells can do little more than sit or lie on their bunks or the floor, or use the sanitary facilities." *Id.* at 1278. "Occasionally, four- and sometimes even five-inmates are assigned to one cell . . . With five inmates, three must sleep on the floor, squeezed between the bars in front and the toilet in the rear of the cell. Inmates have been compelled to endure this latter type of confinement for days or even weeks at a time . . . ." *Id.* "Unwarranted staff brutality at TDC violates not only the eighth amendment but the fourteenth amendment as well, inasmuch as it constitutes punishment devoid of the benefits of due process of law." *Id.* at 1305.

	Case Analysis
	Medical care system "persistently and predictably fails adequately to provide for the legitimate medical needs of the prison population." *Id.* at 1307.
44.	***Sites v. McKenzie*, 423 F. Supp. 1190 (N.D. W. Va. 1976)** *PETITIONERS' DESCRIPTION*—"[S]tate statute precluding inmates confined to mental institutions from parole eligibility violated Equal Protection Clause." (U.S. Br. 23a) *COMMENTS*—Found due process safeguards in statute used to commit prisoners to mental institution to be "procedurally and substantively deficient in comparison to the protections . . . under the civil commitment statute." 423 F. Supp. at 1193. No rational basis for distinguishing between civilly insane and criminally insane. *Id.* at 1194. Equal protection violation also found where prisoners in mental hospitals did not have opportunity for parole at end of sentence unless recovered. *Id.* at 1194-95. Found violation of Rehabilitation Act where plaintiffs were executed from vocational rehabilitation opportunities because of mental illness. *Id.* at 1197. Not a claim for disability discrimination. Here, mentally disabled inmates were seeking treatment equal to that of civilly committed mentally ill, or same treatment as similarly disabled non-prisoners.

Case Analysis	
45.	***Sykes v. Kreiger*, 451 F. Supp. 421, 426 (N.D. Ohio 1975)** *PETITIONERS' DESCRIPTION*—"[I]n inmate suit seeking relief for violations of constitutional rights, county jail officials ordered to submit a plan for the creation of a psychiatric ward for the inmates." (U.S. Br. 22a) *COMMENTS*—Class action regarding variety of conditions in Cuyahoga County Jail, brought on behalf of "persons confined at Cuyahoga County Jail . . . for reasons other than as punishment resulting from a conviction of a criminal offense." 451 F. Supp. at 423. Crowding conditions provide between 13 and 35 sq. ft. and 140.2 cubic ft. sleeping area per inmate. *Id.* at 423. Found Fifth and Fourteenth Amendment violations as a result of crowding. *Id.* at 424. Inmates sought wide variety of rights, including counsel-substitute for disciplinary hearings, mail rights in isolation, and additional rights in connection with visitation and telephone calls. *Id.* at 423.

Case Analysis	
46.	***Talley v. Stephens*, 247 F. Supp. 683, 687 (E.D. Ark. 1965)** *PETITIONERS' DESCRIPTION*—"[F]orcing inmates with 'serious physical handicaps' to perform labor that they were physically unable to perform, and denying access to medical care, violated Eighth Amendment." (Goodman Br. 30 n.15) *COMMENTS*—Sought injunction against summary corporal punishment. Inmates forced to harvest crops and subjected to summary whipping if work insufficient by subjective and unrestrained judgment of assistant wardens. Not a claim for disability discrimination. Court notes that two plaintiffs were "laboring under serious physical handicaps [and] that their physical condition has been classified as 'poor' by the prison physician" (247 F. Supp. at 687), but did not specify further. Plaintiffs also claimed denial of access to the courts.

Case Analysis	
47.	***Thompson v. City of Portland*, 620 F. Supp. 482, 485-87 (D. Me. 1985)** *PETITIONERS' DESCRIPTION*—"[P]olice violated the constitutional rights of a blind diabetic who was in insulin shock by arresting him, transporting him on floor of police cruiser, jailing him, and ignoring his explanation that he was in insulin shock, despite fact that he wore a MedicAlert necklace and carried a white cane." (U.S. Br. 20a) *COMMENTS*—Not discrimination in prison; plaintiff's complaint against City of Portland police arose from events surrounding his arrest. Not purposeful discrimination; officers' mistreatment occurred because they did *not* recognize he had a disability. Specifically noted that plaintiff was not incarcerated and therefore 8th Amendment did not apply. 620 F. Supp. at 488. Found substantive due process violation because police officer's (state's) conduct shocked the conscience. *Id.*

	Case Analysis
48.	***Tillery v. Owens*, 719 F. Supp. 1256, 1302-03 (W.D. Pa. 1989), *aff'd*, 907 F.2d 418 (3d Cir. 1990)** *PETITIONERS' DESCRIPTION*—"[P]rison officials showed deliberate indifference to inmates' medical, dental, and psychiatric care needs, in violation of the Eighth Amendment, where, due to overcrowding, officials had failed to provide adequate staffing and equipment, and failed to maintain an environment conducive to treatment of serious medical illness." (U.S. Br. 19a) "[I]nadequate care of 'serious mental illness' violated Eighth Amendment." (Goodman Br. 30 n.15) *COMMENTS*—Class action on behalf of inmates at State Correctional Institution at Pittsburgh. "[W]e find that nearly every aspect of SCIP inadequate, falling far below constitutional standards. In fact . . . we might very well order that SCIP be closed immediately; it is an overcrowded, unsanitary, and understaffed fire trap." 719 F. Supp. at 1259. Inmates double-celled in 8x7 cells. In some, "inmates . . . can do little more than lie or sit on their bunks or desks." *Id.* at 1264. Did find psychiatric observation cells to be "the most wanton and unnecessary infliction of pain we encountered" because unsanitary. *Id.* at 1304.

	Case Analysis
49.	***Vitek v. Jones*, 445 U.S. 480 (1980)** *PETITIONERS' DESCRIPTION*—"Due process protections required to transfer prisoner to state mental hospital." (U.S. Br. 1a, 35 n.30, 37) "Due process applies 'when the State seeks to transfer an inmate to a "supermax" facility or a psychiatric hospital.'" (Goodman Br. 18) *COMMENTS*—Held that prisoners are entitled to due process protections prior to involuntary transfer to mental hospital. No claim that prisoners were being transferred because of intentional, irrational State discrimination.

	Case Analysis
50.	***Waldrop v. Evans*, 681 F. Supp. 840 (M.D. Ga. 1988)** *PETITIONERS' DESCRIPTION*—"[C]onsulting psychiatrist's decision to remove inmate from antipsychotic drug abruptly raised material question of fact as to psychiatrist's alleged deliberate indifference to inmate's medical needs; prison doctor's failure to contact psychiatrist after he learned of inmate's depression and attempts to lacerate his arm likewise raised material question of fact as to doctor's alleged deliberate indifference to inmate's medical needs." (U.S. Br. 20a) *COMMENTS*—Mentally ill inmate rendered himself totally blind and without testicles as a result of a series of self-mutilatory acts while in prison. Had seen a series of prison doctors and mental health professionals and had received treatment along the way. Court granted summary judgment to nine individual defendants, including some health professionals and the high-ranking prison administrators that had been named, as to plaintiff's deliberate indifference claims. 681 F. Supp. at 862. Denied summary judgment to two of the doctors, finding fact questions as to treatment decisions they made. *Id.* at 854-55. Court specifically found that psychiatric staffing was adequate. In explaining why Commissioner and Superintendent could not be found deliberately indifferent, court specifically found that "GDCC was adequately staffed with medical professionals including three staff physicians and one consulting psychiatrist." *Id.* at 849.

	Case Analysis
51.	***Wellman v. Faulkner*, 715 F.2d 269, 272-73 (7th Cir. 1983)** *PETITIONERS' DESCRIPTION*—"[D]enial of adequate psychiatric care to inmates with mental illness violated Eighth Amendment." (Goodman Br. 30 n.15) *COMMENTS*—Court found "evidence of general systemic deficiencies to establish that there is deliberate indifference to serious medical needs . . ." and deficient psychiatric care. 715 F.2d at 272. Found unconstitutional overcrowding. *Id.* at 274. Some inmates spend 22-23½ hours per day in cells with one 17 square feet of floor space. *Id.* Awarded $500 - $1000 in damages to each of three plaintiffs in compensation for specific instances of medical maltreatment, specifically noting these damages were "not for the general deficiencies in medical facilities and personnel." *Id.* at 275.

	Case Analysis
52.	***Williams v. Edwards*, 547 F.2d 1206, 1217 (5th Cir. 1977)** *PETITIONERS' DESCRIPTION*—"[U]pholding finding of Eighth Amendment violations where prison provided no mental health care despite finding that 40% of inmates would benefit from psychiatric treatment." (U.S. Br. 8a) *COMMENTS*—Original complaint alleged racial discrimination against minority inmates and that "conditions at the prison violated the eighth and fourteenth amendment rights of the prison population as a whole." 547 F.2d at 1208. Affirmed district court finding that totality of conditions violated Eighth Amendment. *Id.* at 1211. Affirmed decision that level of medical care violated Eighth Amendment and due process clause of the and Fourteenth Amendment. *Id.* at 1218-19. Medical care entirely deficient, *e.g.*, pharmacist not trained or licensed, dental clinic not inspected or accredited, "filthy" emergency equipment, unsupervised inmates performing sutures, physical therapy department whirlpool occupied by fish being kept fresh prior to eating them. Remanded crowding claims. *Id.* at 1214-15. Normal cell size was 6 x 8 feet in some cases. *Id.* at 1215.

	Case Analysis
53.	***Yarbaugh v. Roach*, 736 F. Supp. 318 (D.D.C. 1990)** *PETITIONERS' DESCRIPTION*—"[P]reliminary injunction granted to inmate with multiple sclerosis who was not provided with assistance in daily life, as a result of which he had not showered in many months and had fallen several times while transferring between his wheelchair and his bed." (U.S. Br. 18a) *COMMENTS*—Plaintiff incarcerated in D.C. Detention Facility Infirmary had multiple sclerosis and sued for adequate accommodations and medical treatment.
54.	***Young v. Harris*, 509 F. Supp. 1111, 1113 (S.D.N.Y. 1981)** *PETITIONERS' DESCRIPTION*—"[S]tate prisoner's complaint stated an Eighth Amendment claim where, despite passage of over two years since a leg brace was ordered and over 16 months since the problem with his leg had been brought to the attention of the prison authorities, he had not been provided with a leg brace that was necessary to enable him to walk without substantial difficulty and discomfort." (U.S. Br. 28a) "[A]llegation that prison refused to provide disabled inmate 'with a leg brace that is necessary to enable him to walk without substantial difficulty' stated an Eighth Amendment claim." (Goodman Br. 29 n.14) *COMMENTS*—Denied motion for summary judgment where prisoner with "physical impairment" that required leg brace sought injunctive relief requiring prison officials to provide brace and also sought monetary damages. 509 F. Supp. at 1112-15. Court found plaintiff had sufficiently stated a claim for Eighth Amendment violation and also gave leave to amend complaint as to monetary damages. *Id.* Not a claim for intentional discrimination on the basis of disability.

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IN THE

Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

STATE OF GEORGIA, ET AL.

Respondents.

TONY GOODMAN,

Petitioner,

v.

STATE OF GEORGIA, ET AL.,

Respondents.

On Writs Of Certiorari To The United States Court of Appeals For The Eleventh Circuit

BRIEF OF AMICI CURIAE TENNESSEE, ALABAMA, COLORADO, DELAWARE, IDAHO, MICHIGAN, NEVADA, NEW HAMPSHIRE, OKLAHOMA, OREGON, PUERTO RICO, WASHINGTON, WYOMING IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether applying Title II of the Americans with Disabilities Act to every service, program and activity of a state prison—so States can be sued for money damages—is valid remedial legislation under § 5 of the Fourteenth Amendment.

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INTERESTS OF *AMICI CURIAE*

As sovereign States, *amici* have a strong interest in preserving the principles of dual sovereignty that are "a defining feature of our Nation's constitutional blueprint." *Federal Mar. Comm'n* v. *South Carolina State Ports Auth.*, 535 U.S. 743, 751 (2002). One of those principles, as this Court has noted, is that "immunity from private suits [is] central to sovereign dignity." *Alden* v. *Maine*, 527 U.S. 706, 715 (1999). Given the importance of that immunity, *amici* have an intense interest in ensuring that Congress's power to abrogate it remains within the bounds set by the Constitution.

On a practical level, of course, *amici* are concerned here about Congress' attempt to abrogate their sovereign immunity as to private damage claims brought by prison inmates under Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12131-12134 ("ADA"). Like most Americans, *amici* applaud the ADA's goal of ensuring that disabled citizens are protected from invidious discrimination and have every opportunity to participate fully in the benefits our society provides to other citizens. Prisons, however, are dangerous places for all who work or live there. Accordingly, as this Court stated recently "[t]he state's first obligation must be to ensure the safety of guards and prison personnel, the public and the prisoners themselves." *Wilkinson* v. *Austin*, 125 S. Ct. 2384, 2396 (2005). Recognition of private ADA claims has the potential to disrupt sound prison administration which, as this Court has often noted, is "peculiarly within the province and professional expertise of corrections officials." *Pell* v. *Procunier*, 417 U.S. 817, 827 (1974).

Of even greater importance are the potential implications of this case for future invocations of Congress' power to abrogate sovereign immunity under § 5 of the 14th Amendment. This case raises two profound questions about the proper exercise of that power.

The first concerns the nature and extent of the evidence that must be present before Congress can reasonably conclude that the States are violating that Amendment with sufficient frequency to constitute a "widespread pattern," and thus justify the invocation of its § 5 power. *City of Boerne* v. *Flores*, 521 U.S. 507, 531 (1997). Here, despite the seemingly impressive number of cases cited by the Petitioners, upon closer inspection the evidence of State violations of the constitutional rights of disabled prisoners is exceedingly thin. At most, when the ADA was passed, Congress had before it no more than 40 concrete cases over a period of several decades in which a violation of disabled inmates' Fourteenth Amendment rights had arguably been established. That compares with a 1990 State prison population of more than 700,000, approximately one-third of whom typically claim some form of disability. If Congress can invoke its § 5 power on the basis of constitutional violations comprising such a minuscule percentage of the relevant universe, *Boerne*'s "pattern" requirement is a paper tiger.

The second question concerns the standard for determining when a particular exercise of Congress' § 5 power is, in *Boerne*'s formulation, "congruent and proportional" to any proven pattern of constitutional violations. *Boerne*, 521 U.S. at 520. Here, Petitioners have proven at most that a handful of States had violated the constitutional rights of a disabled inmate more than once-and no more than a handful of times-during the decades preceding the ADA's enactment. A decision to abrogate the sovereign immunity of even those States is hardly a "proportional" response to such a small number of violations affecting a tiny percentage of the prison population. And the abrogation of sovereign immunity is even more wildly disproportionate when applied to the many States (like Oklahoma) for which only a single violation has arguably been established, or the many other States (like Tennessee,

Nevada and Wyoming) for which *no* violations have been established. Here again, if Congress' response is deemed "proportional" to the violations at issue here, that requirement provides no real limit on Congress' power.

That is not to say that any State is, or should be, allowed to discriminate against the disabled with impunity. For example, sovereign immunity does not block suits for money damages or other relief brought by the United States. But the abrogation of sovereign immunity at issue here is neither within Congress' authority under the Fourteenth Amendment nor necessary as a matter of policy.

STATEMENT OF THE CASE

Although *amici* agree with the Statement of the Case by Respondent, State of Georgia, we highlight here a few of the salient facts. Petitioner Tony Goodman, who alleges that he is a paraplegic, raised both Eighth Amendment and ADA claims in the district court. Goodman Pet. App. at 1a-2a. The Eleventh Circuit held that he had stated a claim under the Eighth Amendment for allegations related to excessive restraint, exposure to human waste, and inadequate medical care, and that he therefore can pursue a claim under 28 U.S.C. § 1983 for those alleged violations. *Id.* at 18a-19a.

As to his ADA claims, Petitioner added a variety of other complaints such as being denied access to bathing or showers, adequate heating and ventilation, laundry and cleaning services, college programs, vocational training, recreation, entertainment, television, phone calls, freedom of movement, and religious services. *Id.* at 6a. The Eleventh Circuit held that those claims must be dismissed, relying on its holding in *Miller v. King,* 384 F.3d 1284 (11th Cir. 2004), that "Title II prohibits far more conduct and in many more areas of prison administration than conceivably necessary to enforce the Eighth Amendment ban on cruel and unusual punishment." *Id.* at 1274. As a result, "Title II of the ADA, as applied in this prison case, does not validly abrogate the

States' sovereign immunity and cannot be enforced against the State of Georgia ... in a suit for money damages." *Id.* at 1275-76.

SUMMARY OF ARGUMENT

Although the Court in *Tennessee* v. *Lane*, 541 U.S. 509 (2004), held that Congress could validly abrogate State sovereign immunity in applying Title II in the limited context of access to the courts, extending that holding to the countless functions required to run a State *prison* is entirely different. Critical to the Court's decision in *Lane* was the fact that access to the courts implicated a variety of "fundamental rights" requiring heightened scrutiny which, in turn, allowed for a more expansive view of the congressional evidence, and a more expansive remedy, than would otherwise be permitted under a lesser standard. No doubt for that reason, the Court was careful to limit its holding to that specific context.

What Petitioners propose here is far more sweeping. Rather than apply Title II in a single limited context, Petitioners propose to apply it to every service, program and activity provided by state prisons. In doing so, Petitioners are attempting to pound a very large, square peg into the much smaller round hole left by *Lane*. It does not fit.

Preliminarily, it is important to remember that none of the rights asserted here triggers the heightened scrutiny that was pivotal in *Lane*. Unlike *Lane*, this case involves constitutional rights asserted in prison. Under settled precedent, such claims are generally judged under a deferential "reasonably related" test. *See, e.g., Turner* v. *Safley*, 482 U.S. 78, 89 (1987). Similarly, Eighth Amendment claims require a showing of "*deliberate* indifference" to inmates' suffering, not just a failure to accommodate the needs of various classes of prisoners. *See, e.g., Farmer* v. *Brennan*, 511 U.S. 825, 835 (1994). This Court has never applied strict scrutiny, or even heightened scrutiny, to such claims by disabled prisoners.

As we show below in Section I, the level of scrutiny influences the record of constitutional wrongs that must be shown to justify an abrogation of sovereign immunity. If heightened scrutiny is triggered, then it is "easier for Congress to show a pattern," *Nevada Dep't. of Human Res.* v. *Hibbs*, 538 U.S. 721, 736 (2003), and if not, showing a pattern is all the more demanding. Petitioners have assembled a mass of material to argue that Congress was responding to a "widespread pattern" of States violating the rights of disabled inmates. Yet, as detailed in Georgia's brief, closer inspection shows this material to be comprised largely of examples that either do not involve States, or that arose *after* the ADA, or that simply are not constitutional violations in the first place. Even for States where there is evidence of scattered violations over decades of prison operations, this evidence scarcely establishes any "widespread" pattern. And remarkably, for many States, there is no evidence--or even an allegation--of *any* constitutional violations before the passage of the ADA. See Appendix A. Thus, there simply is no factual predicate for abrogating the States' sovereign immunity.

But even if the record were deemed sufficient to establish *some* limited pattern of constitutional violations, Title II's blanket abrogation of sovereign immunity is not by any stretch a "congruent and proportional" response, as required by *City of Boerne*. Particularly when the rights asserted do not give rise to any heightened scrutiny, it simply cannot be congruent and proportional—if the phrase is to retain any meaning—for States to lose their sovereign immunity when there is no evidence they violated any rights before the ADA was enacted. Nor is it congruent and proportional to deprive a State of that immunity in response to at most a handful of violations over a period of several decades, in comparison to the thousands or even tens of thousands of disabled inmates that a State would typically have housed during that period.

For all these reasons, abrogating the States' sovereign immunity for Title II claims asserted by inmates hardly

constitutes "enforcement" of Fourteenth Amendment rights. It is, rather, an attempt to *redefine* the constitutional rights of disabled prisoners. And, if sustained, it will inevitably mark the end of deference to State prison operations.

ARGUMENT

As this Court has repeatedly held, the States joined the Union "with their sovereignty intact," *Blatchford* v. *Native Vill. of Noatak and Circle Vill.*, 501 U.S. 775, 779 (1991), a "central" feature of which was "immunity from private suits," *Alden* v. *Maine*, 527 U.S. 706, 715 (1999). Only under § 5 of the Fourteenth Amendment may Congress abrogate the States' immunity, and only when it acts "to enforce," by "appropriate legislation" the rights guaranteed by that amendment. *See Bd. of Trs. of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 364-65 (2001) (quoting § 5 of the Fourteenth Amendment).

To be sure, Congress has wide latitude under § 5 in choosing how to enforce the Fourteenth Amendment, and "its conclusions are entitled to much deference." *City of Boerne* v. *Flores*, 521 U.S. 507, 536 (1997). Congress, moreover, is "not confined to legislation that merely parrots the precise wording of the Fourteenth Amendment." *Kimel*, 528 U.S. at 81. However, as broad as Congress' power under § 5 may be, "it is not unlimited." *Boerne*, 521 U.S. at 519 (quoting *Oregon* v. *Mitchell*, 400 U.S. 112, 128 (1970)). Congress is only authorized to enact remedial legislation "to enforce" constitutional guarantees. It cannot "decree the substance of the Fourteenth Amendment's restrictions on the States." *Id.* And the history of the Fourteenth Amendment re-enforces that its framers sought to avoid the "dangerous centralization of power" that would result if it became a license to legislate generally. *Id.* at 522 (citation omitted).

While the line between remedial and substantive legislation is not always clear, "the distinction exists and must be observed." *Id.* at 520. Indeed, observing the line is "necessary to prevent the Fourteenth Amendment from

obliterating the Framers' carefully crafted balance of power between states and the National Government." *United States* v. *Morrison*, 529 U.S. 598, 620 (2000).

To draw the line between remedial and substantive legislation, this Court has developed a three-part test. The first step is to "identify with some precision the scope of the constitution right at issue," that is, the "metes and bounds" of the right in question. *Garrett*, 531 U.S. at 365, 368. Second, the Court asks "whether Congress identified a history and pattern of unconstitutional" action to be remedied. *Id.* at 368. Finally, assuming some such "pattern" has been demonstrated, the remedy must be a "congruent and proportional" response to that pattern. *Id.* at 374.

Amici agree with respondent Georgia's analysis of the "metes and bounds" of the constitutional rights at issue here. However, even if the Court were to adopt Petitioners' broad approach to that issue, Congress did not validly abrogate the States' sovereign immunity from suits under Title II because (1) the record does not demonstrate the requisite "history and pattern" of constitutional violations, and (2) in all events, the means Congress chose to address the arguably proven constitutional violations are not a "congruent and proportional" response. It follows that Title II's abrogation of sovereign immunity is not proper "enforcement" of Fourteenth Amendment rights, either under the *Boerne* approach, or under the more restrictive approach outlined in Justice Scalia's dissent in *Tennessee* v. *Lane*, 541 U.S. at 563-65 (2004).

I. The Record Does Not Support The Requisite Finding Of a "History and Pattern" Of States Violating The Constitutional Rights Of Disabled Prison Inmates.

The "history and pattern" portion of the *Boerne* test helps distinguish between "corrective legislation," which is targeted at remedying specific constitutional violations, and general substantive legislation. As shown below, in contrast

to the situation in *Lane*, here the requisite "pattern" cannot reasonably be inferred from allegations (or even limited evidence) of disparate treatment, given that Fourteenth Amendment rights are not subject to strict scrutiny in the prison environment. Moreover, close examination of Petitioners' analysis reveals that, at the end of the day, the evidence of *real* violations of disabled inmates' Fourteenth Amendment rights by the States is exceedingly thin.

A. Unlike The Situation In *Lane*, Constitutional Violations Cannot Be Inferred From Mere Allegations Or Even Evidence Of Disparate Treatment Because Fourteenth Amendment Claims Are Not Subject to Strict Scrutiny In The Prison Setting.

The Court has made clear that the level of constitutional review influences the second part of the *Boerne* test because, if heightened scrutiny is triggered, then it is "easier for Congress to show a pattern of state constitutional violations." *Hibbs*, 538 U.S. at 736. Conversely, where as here the rights asserted do not trigger strict scrutiny, establishing a widespread pattern requires more exacting evidence than in cases such as *Hibbs* or *Lane*.

1. As to the rights at issue, Petitioners here assert not only the Eighth Amendment claims actually raised in this case, but also what the government calls a "cluster" or "constellation" of hypothetical claims that might arise in the many contexts involved with running a prison.[1] Pet'r Br. at

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[1] While Petitioners allude to a denial of access to the prison law library or religious services, there are no specific factual allegations as to either. While *Lane* considered a variety of fundamental rights, they were all related to a single limited context–access to actual courthouses. Here, on the other hand, petitioners seek to invoke rights that touch on numerous different features of prison life. For example, the law library is an entirely different context from the prison chapel or medical services. And as such, the rights that petitioners assert here far exceed the "metes and bounds" of the single context in *Lane*.

16-17; Gov't Br. at 14-15. Petitioners then argue for heightened scrutiny for all of these rights because prisons "exert a degree of control unparalleled in society." Pet'r Br. at 14 (quoting *Cutter* v. *Wilkinson*, 125 S. Ct. 2113, 121-22 (2005)); Gov't. Br. at 38. Petitioners are wrong. To be sure, prisons do exert "unparalleled control" over inmates because "[t]he very object of imprisonment is confinement." *Overton* v. *Bazzetta*, 539 U.S. 126, 131 (2003). However, it is precisely because of that "control," and the responsibilities that go with it, that this Court has long recognized that operating a prison is a difficult and complex task that is entitled to substantial deference. As the Court explained in *Turner* v. *Safley*, 482 U.S. 78 (1987):

> Running a prison is an inordinately difficult undertaking that requires expertise, planning and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. . . . Where a state penal system is involved, federal courts have . . . additional reason to accord deference to the appropriate prison authorities.

482 U.S. at 84-85. As a result, "[s]ubjecting the day-to-day judgment of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration." *Id.* at 89. Instead of strict scrutiny, the Court has looked to whether the regulation was "reasonably related to legitimate penological interests." *Id.* at 89.

This deference to prison administration has been affirmed repeatedly by the Court. In *Overton*, the Court considered whether prison regulations on family visits violated the First Amendment. In holding that the visitation rules did not violate the prisoners' rights, the Court stated: "Many of the liberties and privileges enjoyed by other citizens must be surrendered by the prisoner. An inmate does not retain

rights inconsistent with proper incarceration." 539 U.S. at 131. Citing *Turner*, the Court found that the regulation bore a "rational relation to legitimate penological interests" and thus it "must accord substantial deference to the professional judgment of prison administrators." *Id.* at 132. Further, "[t]he burden, moreover, is not on the State to prove the validity of the prison regulation but on the prisoner to *disprove* it." *Id.* at 132 (emphasis added). *Accord O'Lone* v. *Estate of Shabazz*, 482 U.S. 342, 349 (1987) (prison rules for religious practices should be accorded deference and "judged under a 'reasonableness' test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights").[2]

To be sure, the rule of deference to prison administration includes a limited exception for cases of *racial* discrimination which require a higher level of scrutiny. *See Lee* v. *Washington*, 390 U.S. 333 (1968). However, this exception—most recently reaffirmed in *Johnson* v. *California*, 125 S. Ct. 1141 (2005)—does not alter the general rule of deference to prison operations. In fact, in *Johnson*, the Court noted that *Turner* rejected strict scrutiny for prison administration generally, but simply reaffirmed the rule in *Lee* that applies strict scrutiny to racial classifications. 125 S. Ct. at 1149. The Court has never held or suggested, however, that the Fourteenth Amendment requires similar treatment of alleged discrimination based upon disability. To the contrary, the

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[2] Another recent example is *Wilkinson* v. *Austin*, 125 S. Ct. 2384 (2005), in which the Court conducted a due process analysis of the procedures for transferring an inmate to a "Supermax" facility. After recognizing the security concerns in running a prison, the Court stated that "[t]he problem of scarce resources is another component of the State's interest" and cited the annual cost of keeping an inmate in prison. *Id.* at 2397. As a result, "[i]t follows that courts must give substantial deference to prison management decisions before mandating additional expenditures for elaborate procedural safeguards when correctional officials conclude that a prisoner has engaged in disruptive behavior." *Id.*

Court has rejected that proposition in *City of Cleburne* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432, 442-43 (1985).

Accordingly, the argument Petitioners advance here—that prisons are generally subject to heightened scrutiny because they have "unparalleled control"—ignores established authority to the contrary. This Court has recognized that the "relationship of state prisoners and the State officers who supervise their confinement is far more intimate than that of a state and a private citizen." *Preiser* v. *Rodriguez*, 411 U.S. 475, 492 (1973). Yet except in the case of racial discrimination, prison administration has never been subjected to strict scrutiny and Petitioners cite no authority to that effect. Petitioners have not asked this Court to overrule either *Turner* or the holding of *City of Cleburne* that disability itself does not require heightened scrutiny. It follows that disabled inmates are not a suspect class because of any "control" exercised over them.

2. Petitioners also cite *dicta* in *Johnson* to argue that the deferential test of *Turner* does not apply to Eighth Amendment claims: "We judge violations of that Amendment under the 'deliberate indifference' standard, rather than *Turner's* 'reasonably related' standard." 125 S. Ct. at 1149-50. Pet'r Br. at 17; Gov't Br. at 37. Yet Petitioners fail to mention that, even if *Turner* does not apply, the deliberate indifference test is still unquestionably a high standard and does not require anything remotely approaching the kind of strict scrutiny that applies to claims of race discrimination. *See Farmer* v. *Brennan*, 511 U.S. 825, 837 (1994) (mere negligence is not enough; there is no liability unless the prison official "knows of and disregards an excessive risk to inmate health or safety"). Indeed, to our knowledge, this Court has never intimated that Eighth Amendment claims are subject to strict scrutiny. To the contrary, this Court's Eighth Amendment decisions have been mindful of the same difficulties of prison administration that call for judicial restraint and deference.

For instance, in *Farmer*, this Court recognized that a prison official's duty under the Eighth Amendment includes ensuring "reasonable safety," which "incorporates due regard for prison officials' 'unenviable task of keeping dangerous men in safe custody under humane conditions'." *Id.* at 844-45 (quoting *Spain* v. *Procunier*, 600 F.2d 189, 193 (9th Cir. 1979) (Kennedy, J.)). Similarly, in *Rhodes* v. *Chapman*, 452 U.S. 337 (1981), the Court held that housing two inmates in a cell did not violate the Eighth Amendment. The Court further found that such "considerations properly are weighed by the legislature and prison administration rather than by a court" and that "a prison's internal security is peculiarly a matter normally left to the discretion of prison administrators." *Id.* at 338, 349 n.14. Thus, even if the *Turner* test itself does not apply, the standard for Eighth Amendment claims remains high, and those claims have never been subject to heightened scrutiny.

3. As to rights besides the Eighth Amendment, Petitioners' argument that these should receive the same heightened scrutiny as in *Lane* overlooks the fundamental difference that the rights in *Lane* were not asserted in prison. Moreover, settled precedent directly forecloses heightened scrutiny for any of the hypothetical claims Petitioners assert.

First, Petitioners attempt to implicate the access to the courts that was the focus in *Lane* by reference to prison law libraries. But this argument is completely at odds with *Lewis* v. *Casey*, 518 U.S. 343 (1996). In *Lewis*, the Court considered an injunctive order that purported to ensure "access to the courts" by mandating detailed procedures for operating a prison law library. *Id.* at 346-47. The Court reviewed the order in light of the deferential *Turner* standard and found it to be "inordinately—indeed, wildly—intrusive." *Id.* at 361-62. Nowhere in *Lewis* did the Court suggest that access to the library should be determined under a standard of heightened scrutiny.

Petitioners also argue for a more searching review based on Petitioner's unknown religious practices. But that contention is foreclosed by *O'Lone*. There, the Court considered the regulation of *actual* religious practices and held that it was error to subject the prison officials to a higher level of scrutiny, especially one that reversed the burden of proof: "By *placing the burden on prison officials* to disprove the availability of alternatives, the approach articulated by the Court of Appeals fails to reflect the respect and deference that the United States Constitution allows for the judgment of prison administrators." 482 U.S. at 350 (emphasis added).

Finally, Petitioners contend that due process concerns are also at issue. Pet'r Br. at 43, 49. But that argument cannot survive decisions such as *Wilkinson*. There, the Court declined to employ heightened scrutiny when considering the procedures for transferring inmates to a "Supermax" facility and again recognized the deference owed to the decisions of prison administrators. 125 S. Ct. at 2397.

In sum, Petitioners' attempt to invoke heightened scrutiny for any of the constitutional rights they assert in the prison setting—real or hypothetical—runs directly contrary to settled precedent of this Court.

4. That failure-which is the key difference between this case on the one hand, and *Lane* and *Hibbs* on the other-fundamentally changes the way in which the record of alleged violations must be read. In *Lane* and *Hibbs*, where the rights at issue were subject to heightened scrutiny, it was arguably reasonable for the Court to assume a pattern of *actual* constitutional violations based upon a pattern of *alleged* violations. After all, if the burden is on the State to justify a disparity that has been alleged by counsel or a party subject to the good-faith requirements of Fed. R. Civ. P. 11 (or similar state rules), it is reasonable to infer that those alleged disparities will actually represent constitutional violations in a reasonable percentage of cases.

On the other hand, where by the nature of the claim the State is entitled to a "presumption of correctness," and the burden is upon the *claimant* to prove that an alleged disparity not only exists but is not justified under the law (*i.e.*, is not reasonably related to legitimate penological goals or is the result of deliberate indifference), such inferences are not reasonable. Indeed, a State may well have been subject to numerous allegations of that sort and yet have *never* violated the Constitution in its treatment of a disabled inmate. Thus, at least in the prison context, a congressional finding of a "history and practice" of constitutional violations cannot be based upon mere allegations. It must be based upon *proven* violations. Moreover, it must be based not merely on the "existence" of some state conduct, but upon "a widespread pattern." *Hibbs*, 538 U.S. at 735 (citing *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 90 (2000)).

B. The Record Of Arguably Proven Constitutional Violations Over Several Decades Available To Congress In 1990 Does Not Establish A Pattern Of Violations, Especially In Relation To The Overall State Prison Population.

Petitioners here have utterly failed to establish such a pattern. Petitioners have assembled what at first glance appears to be an impressive array of judicial decisions—some 150—between the two of them. Pet'r Br. at 26-36; Gov't Br. at 30-32 & Addendum A. Yet when judged by proper standards of what "counts" as a violation, and therefore what is properly included in a record of what Congress "responded to," the mass of even arguably relevant examples shrinks dramatically. And when those examples are considered on a state-by-state basis, and in relation to the State prison population in 1990 when Congress acted, it becomes apparent that no "widespread history and pattern" of unconstitutional treatment was ever established as a predicate for the abrogation of State sovereign immunity from inmates' suits under Title II.

1. Petitioners have relied upon entire categories of anecdotal evidence that have no bearing on the issue, in addition to cases in which a violation was only alleged and never even arguably established. The first category consists of violations allegedly occurring *after* the ADA was passed. Logically, Congress can only act "in response to" a widespread pattern based on a record existing *at the time it acted*. *See, e.g., Garrett*, 531 U.S. at 368; *Hibbs*, 538 U.S. at 730 ("According to evidence that was *before* Congress when it enacted the [Family Medical Leave Act]. . . .") (emphasis added).

Petitioners also rely heavily upon actions allegedly occurring in county jails. Yet abrogating the sovereign immunity of the States requires evidence of violations by the States themselves. In *Garrett*, the Court made explicit what had been implicit in earlier cases—that Congress must identify a pattern of constitutional violations by States themselves rather than "units of local governments." 531 U.S. at 368-69.

To be sure, in *Lane*, the Court expanded the record to include local governments. But it did so only because that case "concern[ed] the provisions of judicial services, an area in which local governments are typically treated as 'arm[s] of the State' for Eleventh Amendment purposes." 541 U.S. at 527 n.16 (alteration in original). This case, however, does not involve courthouses, and Petitioners' sweeping statement that county jails are "arms of the state" for Eleventh Amendment purposes is not accurate. Pet'r Br. at 22-23 n.7; Gov't Br. at 18 n.19. In fact, county jails often do *not* have Eleventh Amendment immunity and the test turns on an examination of state law and the function being performed.[3]

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[3] *See, e.g., S.J.* v. *Hamilton County*, 374 F.3d 416, 424 (6th Cir. 2004) (concluding that a "juvenile training facility" was not an arm of the state and not entitled to Eleventh Amendment immunity); *Alkire* v. *Irving*, 330 F.3d 802, 811 (6th Cir. 2003) ("It is clear that Holmes County [Ohio] (and Sheriff Zimmerly as an officer of Holmes County) is not an arm of the state that is entitled to Eleventh

Therefore, Petitioners' broad-brush reliance on county jail cases is improper.

2. When judged by the standards of what is properly included in a record of what Congress "responded to,"—namely, actual violations by the States before the ADA—the Petitioners' mass of citations ceases to be anything resembling a widespread pattern. In fact, as the appendix to this brief shows, for 25 of the States there simply is *no* record of any arguably established violations from the Petitioners' case citations. Georgia is one of those 25. Even if violations by local and county governments are added (and they should not be), there are at most only 40 arguable violations of the rights of disabled prisoners, and even then 21 States have no record of any established violations.

Assuming Congress had reviewed these 40 cases before passing the ADA—and there is no indication that Congress

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Amendment immunity."); *Richman* v. *Sheahan*, 270 F. 3d 430, 440 (7th Cir. 2001) (noting that "Under Illinois law, sheriffs are classified as county, not state, officials, and when the sheriff 'performs his duties as the principal executive officer or chief law enforcement officer of the county, he acts as a county official' and the Eleventh Amendment does not apply" and holding that the sheriff is not entitled to immunity for "failure adequately to train and supervise the deputies in deliberate indifference to the plaintiff's rights"); *Streit* v. *County of Los Angeles*, 236 F.3d 552, 555 (9th Cir. 2001) (holding that the Los Angeles County Sheriff's Department "acts for the County in its capacity as the administrator of the Los Angeles County jails" and was not entitled to immunity as an arm of the state); *see also Abusaid* v. *Hillsborough County Bd. of Coounty Comm'rs*, 405 F.3d 1298, 1304 (11th Cir. 2005) (noting that its precedent prior to 2003 (when the ADA was enacted) had "established definitively" that Florida Sheriffs were not entitled to Eleventh Amendment immunity for their actions). Petitioners also include two District of Columbia cases; however, the District of Columbia is not entitled to Eleventh Amendment immunity. *See CSX Transp., Inc.* v. *Williams*, 406 F.3d 667, 674 n.7 (D.C. Cir. 2005) (per curiam).

did—abrogating the sovereign immunity of all 50 states and Puerto Rico cannot in any sense of the word be considered a congruent or proportional "response." In that regard, it is telling that Petitioners offer only two states that have more than a single court finding of a violation prior to the ADA. And even these cases involved preliminary injunctions and touch only tangentially upon disabled inmates when addressing prison conditions generally.

The citations are especially revealing, moreover, considering the population of disabled inmates, coupled with the fact that prisoners are prolific litigators.[4] In 1990 alone, there were more than 700,000 prisoners in state facilities. United States Dep't of Justice, Bureau of Justice Statistics, *Bulletin: Prisoners in 1996* (June 1997), http://www.ojp.usdoj.gov/ bjs/pub/pdf/p96.pdf. Of these, approximately one-third likely could claim some disability. See United States Dep't of Justice, Bureau of Justice Statistics, *Special Report, Medical Problems of Inmates, 1997* (Jan.2001), http://www.ojp.usdoj.gov/bjs/pub/pdf/mpi97.pdf (noting that "nearly a third of State inmates . . . reported having some physical impairment or mental condition"). Accordingly, the violations per inmate are, even with arguable violations, a small fraction of one percent even for States that have reported violations.[5] *See Garrett*, 531 U.S. at 370 (noting that Congress assembled minimal evidence in light of the fact that 43 million Americans are disabled and

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[4] *Witzke* v. *Femal*, 376 F.3d 744, 750 (7th Cir. 2004) ("Prisoners often have an abundance of time, while facing a restricted number of enjoyable activities with which to pass the time other than filing federal suits."); *Kerr* v. *Puckett*, 138 F.3d 321, 323 (7th Cir. 1998) ("Congress deemed prisoners to be pestiferous litigants because they have so much free time on their hands and there are few costs to filing suit.").

[5] Even these percentages are almost certainly overstated because they assume that *all* of the arguably established violations involved inmates who were imprisoned when the ADA was enacted.

that States employed 4.5 million people). If the requirement of a "widespread pattern" is to retain its meaning, it is not satisfied by some 40 cases among 50 States and Puerto Rico over decades of prison operations.

3. Further, Petitioners' citations of Congressional testimony from earlier legislation hardly indicates it was part of the record Congress was responding to in passing the ADA. Petitioners cite an array of earlier legislation and related testimony going back to the late 1960s and 1970s. Pet'r Br. at 21-25; Gov't Br. at 19-27. But the few scattered statements alluding to constitutional violations during hearings decades earlier were not provided or even referenced in the legislative history of the ADA.

Even the few citations of the ADA legislative history that Petitioners offer, *see* Pet'r Br. at 26, only reinforce that the ADA was *not* enacted to remedy Fourteenth Amendment concerns. The citations demonstrate instead that the ADA seeks to "break down barriers," "integrate" the disabled and end "discriminatory" treatment of the disabled with little, if any, reference to constitutional violations or irrational discrimination. *See Garrett*, 531 U.S. at 368 (requiring the legislative record to "identify a pattern of irrational state discrimination in employment against the disabled"). "[H]ad Congress truly understood this information as reflecting a pattern of unconstitutional behavior by the States, one would expect some mention of that conclusion in the Act's legislative findings. There is none." *Garrett*, 531 U.S. at 371.

Similarly, most of the statutes cited by Petitioners do not give any indication they are targeted at preventing *unconstitutional* treatment of the disabled, let alone unconstitutional treatment in state prisons. *See Kimel*, 528 U.S. at 90 (the "study does not indicate that the State had engaged in any *unconstitutional* age discrimination") (emphasis in text). On the contrary, taken as a whole, the statutes are concerned with discrimination against the disabled generally. *See, e.g.*, Section 504 of the Rehabilitation

Act 1973, Pub. L. No. 93-112, 87 Stat. 394 (expanding, *inter alia*, vocational rehabilitative services, employment opportunities, rehabilitative services and rehabilitative training); Act of June 10, 1948, ch. 434, 62 Stat. 351 (prohibiting employment discrimination by the United States Civil Service).[6] But as intractable as that problem may be,

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[6] *See also* Architectural Barriers Act of 1968, 42 U.S.C. § 4151 *et seq.*, Pub. L. 90-480 (requiring buildings financed with government funds be handicapped accessible); Education of the Handicapped Act, Pub. L. No. 91-230, tit. VI, 84 Stat. 175 (reenacted in 1990 as the Individuals With Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*) (noting that its purpose is to "provide for the education of all children with disabilities" among other goals); Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 6000 *et seq., repealed by* Pub. L. 106-402, Title IV, § 401(a), which enacted 42 U.S.C. § 1501 *et seq.* ("The purpose of this subchapter is to assure that individuals with developmental disabilities and their families participate in the design of and have access to needed community services, individualized supports, and other forms of assistance that promote self-determination, independence, productivity, and integration and inclusion in all facets of community life, through culturally competent programs authorized under this subchapter...."); Voting Accessibility for the Elderly and Handicapped Act, 42 U.S.C. § 1973ee *et seq.* ("[T]o promote the fundamental right to vote by improving access for handicapped and elderly individuals to registration facilities and polling places for Federal elections."); Air Carrier Access Act of 1986, 49 U.S.C. § 41705 (prohibiting air carriers from discriminating based on disability); 42 U.S.C. § 1437f ("For the purpose of aiding low-income families in obtaining a decent place to live and of promoting economically mixed housing, assistance payments may be made with respect to existing housing in accordance with the provisions of this section."); Education of the Handicapped Act Amendments of 1983, Pub. L. No. 98-199, § 10, 97 Stat. 1367; Fair Housing Amendments Act of 1988, 42 U.S.C. § 3604 (discrimination in the sale of rental housing); *cf.* Protection and Advocacy for Mentally Ill Individuals Act of 1986, 42 U.S.C. § 10801 ("[T]o ensure that the rights of individuals with mental illness are protected"); Civil Rights of Institutionalized Persons Act (CRIPA), Pub. L. No. 96-247, 94 Stat. 349 (1980) ("An Act to authorize actions for redress

"discrimination" generally has never been synonymous with unconstitutional conduct, especially outside the race context. *See Garrett*, 531 U.S. at 370. In contrast to the heightened scrutiny in *Hibbs* and *Lane*, the rights at issue do not implicate such scrutiny, and a pattern cannot be established with bare assertions of discrimination.

II. Even Assuming Some Pattern Of Violations Had Been Established, The Imposition of A Blanket Abrogation Of Sovereign Immunity, And its Extension To All States Regardless Of Their History, Is Not a Congruent and Proportional Response.

Even if the record before Congress were sufficient to establish some "history and pattern" of unconstitutional action–which it is not–Petitioners must still establish that Congress' response was "congruent and proportional" to any pattern established by the record. Here, Congress' decision to impose a blanket abrogation of sovereign immunity was *not* congruent or proportional even as to the States in which constitutional violations–limited in number as they are–were arguably established in the legislative record. And that decision was even more indefensible as applied to the many States in which *no* violation was established.

A. Congress' Use of the ADA to Abrogate A State's Sovereign Immunity In Response To At Most A Handful Of Arguably Established Violations Over Several Decades Is Not a Congruent and Proportional Remedy.

"Regardless of the state of the legislative record," Congress may overstep its remedial authority if the legislation is "so out of proportion to a supposed remedial or preventive

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in cases involving deprivations of rights of institutionalized persons secured or protected by the Constitution or laws of the United States.").

object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior" or if it "appears, instead, to attempt a substantive change in constitutional protections." *Boerne*, 521 U.S. at 532. In deciding whether § 5 legislation attempts a change in the constitutional protections, the Court looks to whether it "erects protections beyond the Constitution's requirements" or "redefine[s] the States' legal obligations." *Kimel*, 528 U.S. at 86, 88.

1. On its face, Title II is designed to do far more than remedy or deter constitutional violations. Section 12132 of Title II states that "no qualified individual" shall be "excluded from participation in or be denied the benefits of the services, programs or activities of a public entity, or be subjected to discrimination by any such entity." The regulations to carry out this mandate are equally wide-ranging. *See, e.g.*, 28 C.F.R. § 35.130(b) (listing prohibitions against discrimination in an "opportunity to participate" (*id.* (b)(1)(i)), those that are "not equal," (*id.* (ii)), those that are "not as effective" or fail to "reach the same level of achievement" (*id.* (iii)), those that "perpetuate discrimination" (*id.* (v)), that "limit" the "enjoyment" of any right (*id.* (vii)). As the regulations make clear, "Title II addresses *all* prison services, programs and activities—and goes well beyond the basic, humane necessities guaranteed by the Eighth Amendment—to disabled prisoners." *Miller* v. *King*, 384 F.3d 1248, 1274 (11th Cir. 2004). Thus, the all-encompassing nature of Title II "imposes substantially higher burdens" on the state prisons than would be required under either the Eighth Amendment or the *Turner* standard. *Kimel*, 528 U.S. at 87.

The same is true for any of the other rights invoked by Petitioners; Title II creates demands that are far more numerous and higher than are required by the Constitution. Indeed, while the goals of the ADA are worthy, Title II is a poorly tailored and awkward tool to accomplish the enforcement of constitutional rights. For example, though

most of the cases the Petitioners cite in an effort to establish a "pattern and history" concern prison conditions generally; the ADA says nothing of the basic conditions of a prison. It does not mandate sanitary facilities, adequate nourishment, clothing, space, staffing, freedom from unduly harsh punishment, the existence or access to a law library or exercise of religious practices. Instead, Title II would impose money damages on States for a failure to provide innumerable services, programs or activities-all of which go far beyond constitutional rights. *See Cochran* v. *Pinchak*, 401 F.3d 184, 192-93 (3d Cir.) (holding that Title II did not abrogate sovereign immunity for lawsuit seeking money damages for failure to provide blind inmate with, among other things, a tape player and "talking watch": "[Title II] affects far more state prison conduct and prison services, programs and activities than the Equal Protection Clause protects."), *vacated en banc*, pending resolution of this case, 412 F.3d 500 (3rd Cir. 2005).

Thus, Title II is not tailored to enforce constitutional guarantees of disabled inmates; it is far more sweeping—nothing less than a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). And therefore, because Title II applies indiscriminately to all services, programs and activities in state prisons, it cannot in sense be considered "targeted" to enforcing constitutional rights. *Cf. Hibbs*, 538 U.S. at 970 ("Unlike statutes in *City of Boerne*, *Kimel* and *Garrett*, which applies broadly to every aspect of state employer's operations, the FMLA is narrowly targeted...."). It follows that the imposition of financial liability for a State's *failure* to comply with those standards also is not sufficiently "targeted."

Further, the standards for liability under the Eighth Amendment versus Title II are vastly different. The deliberate indifference test is a high standard requiring actual knowledge of a substantial risk. *Farmer*, 511 U.S. at 835-36; *see also, Hernandez* v. *Texas Dept. of Pro. & Reg. Serv.*,

380 F.3d 872, 882 (5th Cir. 2004) (deliberate indifference imposes a "high burden" involving proof of an "intentional choice"). On the other hand, Title II claims do not contemplate anything approaching the high burden required under the Eighth Amendment and may be based on unintentional conduct. *See Ability Ctr. of Greater Toledo* v. *City of Sandusky*, 385 F.3d 901, 909 (6th Cir. 2004) (noting that a claim for "reasonable accommodations" under 28 C.F.R. § 35.151 is not limited to "intentional discrimination"). Thus, applying Title II to State prisons--with the attendant abrogation of sovereign immunity--as a way of redressing Eighth Amendment violations would be a classic case of legislation redefining substantive constitutional law.

2. To be sure, Petitioners argue that Title II does not require a public entity to take steps that would "fundamentally alter" a facility or service or cause an "undue financial" burden. Pet'r Br. at 40; Gov't. Br. at 10, 48. Yet they fail to mention that the Title II regulations themselves place the burden on the *States* to prove that they qualify for such exemptions. *See* 28 C.F.R. § 35.130(b)(7) (reasonable modification required "unless public entity can demonstrate" that modifications would fundamentally alter a service, program or activity); *id* § 35.150(a)(3); *id* 35.164 ("public entity has the burden of proving" that compliance "would result in such alteration or burden"). And if they do not do so, they lose their sovereign immunity as to claims challenging the configuration of their facilities!

Accordingly, when considering whether the line has been crossed between enforcing constitutional rights to rewriting them, the fact that Title II places the burden of proof on the State highlights again that it supplants well-settled constitutional law with its own far-reaching mandate for regulating prison conditions. That contrasts sharply with the rule that prisoners alleging Eighth Amendment violations have the high burden of proving "deliberate indifference"; the State has no burden to disprove that allegation. *Chandler* v. *Crosby*, 379 F.3d 1278, 1289-90 (11th Cir. 2004) (holding

that a prisoner must prove all elements of his Eighth Amendment claim).

The same is true of the other hypothetical claims asserted by Petitioners, which are governed by the even more deferential "reasonably related" test of *Turner*. As this Court reaffirmed in *Overton*, the burden is on the inmate to establish the invalidity of prison conditions. 539 U.S. at 132; *see also O'Lone*, 482 U.S. at 350 (error to place burden on State for rules regulating religious practices). Yet, again, to the extent Title II is designed to "enforce" constitutional rights, it creates what amounts to a presumption that a State prison violates the constitutional rights of disabled inmates whenever the prison fails to comply with all of Title II's detailed standards.

In this regard, Title II is similar to Title I, which was at issue in *Garrett*. There, the Court focused on the fact that Title I placed the burden on the States to show the reasonableness of accommodations in employment "instead of requiring (as the Constitution does) that the complaining party negate reasonable bases for the employer's decision." 531 U.S. at 373. As a result, placing the burden on the States "would allow Congress to rewrite the Fourteenth Amendment law laid down by this Court in *Cleburne*." 531 U.S. at 373-74. Similarly in *Kimel*, the Court held that the Age Discrimination in Employment Act ("ADEA") fundamentally altered equal protection jurisprudence so that it "effectively elevated the standard for analyzing age discrimination to heightened scrutiny." 528 U.S. at 88. By the same reasoning, to impose Title II on every corner of prison life would be to replace the *Turner* and *Farmer* standards for weighing the constitutionality of prison conditions with a new regime embodied in Title II and its regulations.

3. Abrogating sovereign immunity so that States can be sued for money damages is also unnecessary and out of proportion to enforcing any of the constitutional rights at issue. First, inmates have long filed civil rights suits under

28 U.S.C. § 1983 to enforce the same constitutional rights that Petitioners argue should now be enforced by a money damages remedy under the ADA. There is no finding in the ADA—and Petitioners offer no convincing evidence to the contrary—that civil rights suits have been inadequate to redress the constitutional rights of disabled inmates. In fact, as the court of appeals below held, Petitioner may seek relief under § 1983 for the Eighth Amendment claims he has preserved.

Further, including a money damages remedy for prison litigation is a reason for special concern. It is well recognized that prisons provide a unique environment for spawning litigation. *See Roller* v. *Gunn*, 107 F.3d 227, 234 (4th Cir. 1997) ("[T]here has been a far greater opportunity for abuse of the federal judicial system in the prison setting."). In fact, "in 1995, prisoners brought over 25% of the civil cases filed in federal district courts." *Id.* at 230 (citing Administrative Office of the United States Courts statistics).

Petitioners contend that the Prison Litigation Reform Act ("PLRA"), Pub. L. No. 104-134, tit. VIII, provides "protection" to States in this regard. Pet'r Br. at 42. However, this facile assurance about the efficacy of the PLRA overlooks that even assuming it has slowed the growth of such suits, the same conditions that have driven prison litigation in the past and have made prisoners more litigious than the rest of society still exist today. *See, e.g., Nagy* v. *FMC Butner*, 376 F.3d 252, 255-56 (4th Cir. 2004) (PLRA's deferred payment scheme not a "panacea").[7]

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[7] It is not necessary to look any further than the Petitioner in this case for a compelling example of the ongoing potential for vexatious prison litigation. According to the record, Petitioner has filed some 60 lawsuits against the State of Georgia and had five appeals dismissed by the Eleventh Circuit as frivolous. Resp't Br. in Opp'n to Pet. for Cert. at 1-2 n.1. And, although Petitioner raises access to the courts as a reason for abrogating States' sovereign immunity, Pet'r Br. at 16-17, after 60 lawsuits and five appeals, he fails to explain how he was denied access to the courts.

Thus, while the necessity for adding a money damages remedy under the ADA is dubious, the practical effect of this remedy is very real. It will spur more prison litigation at significant expense to the States. This only reinforces the point that a money damages remedy for any deviation from Title II is greatly disproportionate to enforcing the constitutional rights at issue.

B. Abrogating The Sovereign Immunity Of States With No Arguably Demonstrated Violations Is Certainly Not A Congruent And Proportional Response To A Handful Of Arguably Proven Violations In Other States.

In all events, the fact remains that there is simply *no* record of any constitutional violations for many states. As shown above and in the attached table, even if local and county governments are included, 16 of the States had no *alleged* constitutional violations prior to the ADA.[8] And if cases involving county or city jails are excluded, as well as cases involving allegations that were never arguably established, half the States—25 of them—had not been shown to have engaged in *any* violations of the rights of disabled prisoners prior to the ADA's passage. It drains the test of any meaning to find that it is "congruent and proportional" to take away

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[8] An additional indication that the ADA's uniform and sweeping requirements are neither congruent nor proportional is the Government's acknowledgement that "[b]etween 1980 and the enactment of Title II of the Americans with Disabilities Act in 1990, Department of Justice investigations under the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997 *et seq.*, found unconstitutional treatment of individuals with disabilities in correctional facilities in thirteen different States." Gov't Br.; Addendum B. Even when the Government includes findings *after* the passage of the ADA it still can only assert that 33 States have been subject to negative findings. *Id.* It is again clear that Congress made no effort to limit the ADA's intrusions to the alleged harm at issue.

sovereign immunity from a group of States for which there is no evidence of violations.

In *Kimel*, the Court made essentially the same point: "Even if the California report had uncovered a pattern of unconstitutional age discrimination in the States' public agencies at the time, it nevertheless would have been insufficient to support Congress' extension of the ADEA to *every State in the Union.*" 528 U.S. at 90 (emphasis added).

Congress, moreover, has proven that targeting even the most intractable constitutional violations can be accomplished without indiscriminately applying a remedy to all States. In fact, in *Garrett*, the Court found that "[Title I's] constitutional shortcomings are apparent when the [ADA] is compared to Congress' efforts in the Voting Rights Act of 1965." 531 U.S. at 373. With the Voting Rights Act, even with a record showing almost a century of denying African-Americans equal voting rights, Congress still enacted a proportional response targeted only at offending states. *See South Carolina* v. *Katzenbach*, 383 U.S. 301, 308 (1966) (noting that the Voting Rights Act was "aimed at areas where voting discrimination has been most flagrant" and that the Act "included a formula defining the States and political subdivisions to which these new remedies appl[ied]"); *see also Boerne*, 521 U.S. at 525 (noting that the provisions at issue in *Katzenbach* were confined to those regions of the country "where voting discrimination ha[d] been most flagrant" and that the remedy affected a discrete set of laws); *accord City of Rome* v. *United States*, 446 U.S. 156, 177 (1980) (approving legislation limited to "jurisdictions with a demonstrable history of intentional racial discrimination in voting"); *Civil Rights Cases*, 109 U.S. 3, 14 (1883).[9] On the other hand, when

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[9] In the *Civil Rights Cases*, the Court found a portion of the Civil Rights Act to be invalid by noting that

> [i]t does not profess to be corrective of any constitutional wrong committed by the States; it does not make its operation to depend upon any such wrong committed. It applies

Congress has failed to tailor its remedy to the offending States, this Court has found that Congress exceeded its authority. *See United States* v. *Morrison*, 529 U.S. 598, 626-27 (2000) (holding that the statute at issue there was "different from these previously upheld remedies in that it applies uniformly throughout the Nation" even though "Congress' findings indicate that the problem of discrimination against the victims of gender-motivated crimes does not exist in all States, or even most States.").

Rather than imposing a remedy targeted at offending States, as Congress has done in the past, Title II imposes broad, pervasive requirements on every State in the Union-regardless of that State's own record with respect to disabled prisoners. The contrast in proportionality between the remedies in the Voting Rights Act and those in Title II is, as the Court said in *Garrett*, "stark." 531 U.S. at 374. Accordingly, Title II cannot in any sense be considered a "congruent and proportional" response to violations of the rights of disabled inmates in all state prisons.

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Requiring legislation to be proportional ensures both that § 5 legislation is actually remedial while at the same time protecting the sovereign interests of each State. Claiming that a State has a pattern and history of constitutional

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> equally to cases arising in States which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws, as to those which arise in States that may have violated the prohibition of the amendment. In other words, it steps into the domain of local jurisprudence, and lays down rules for the conduct of individuals in society towards each other, and imposes sanctions for the enforcement of those rules, without referring in any manner to any supposed action of the state or its authorities.

Civil Rights Cases, 109 U.S. 3, 14 (1883).

violations is "a most serious charge", *Garrett*, 531 U.S. at 375, (Kennedy, J. concurring), and imputing the violations of one State to another undermines our system of dual sovereigns. Under our system, each State has its own unique sovereign identity, and abrogating a right of sovereignty that is guaranteed by an amendment to the Constitution should be based on more than "guilt by association." *Hibbs*, 538 U.S. at 741-42 (Scalia, J., dissenting). Congress' use of its remedial § 5 authority cannot be considered either congruent or proportional as to those States with no history or pattern of constitutional harm. Nor can it be so considered even as to States with a limited "history" of arguable violations, where as here that history falls far short of a "widespread pattern."

CONCLUSION

The decision of the Court of Appeals for the Eleventh Circuit should be affirmed.

Respectfully submitted,

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Appendix A: Alleged And Arguable Pre-ADA Violations By State*

State	Alleged State & Local Violations	Arguable State & Local Violations	Arguable State Violations	Arguable Local Violations	State Prison Pop. 1990	State Disabled Prison Pop. 1990 (est.)	Maximum Alleged Violations As Percent Of Disabled Pop.	Maximum Arguable Violations As Percent Of Disabled Pop.
AL	3	2	2	0	15,665	5,222	.057	.038
AK	0	0	0	0	2,622	874	0	0
AZ	3	1	1	0	14,261	4,754	.063	.021
AR	1	1	1	0	7,322	2,441	.041	.041
CA	1	0	0	0	97,309	32,436	.003	0
CO	1	1	1	0	7,671	2,557	.039	.039
CT	1	1	1	0	10,500	3,500	.029	.029
DC	2	2	2	N/A	3,471	1,157	.173	.173
DE	0	0	0	0	9,947	3,316	0	0
FL	2	2	0	2	44,387	14,796	.014	.014
GA	1	0	0	0	22,411	7,470	.013	0
HI	0	0	0	0	2,533	844	0	0
ID	1	1	1	0	1,961	654	.153	.153
IL	1	1	1	0	27,516	9,172	.011	.011
IN	2	1	1	0	12,736	4,245	.047	.024
IA	1	1	1	0	3,967	1,322	.076	.076
KS	1	1	1	0	5,775	1,925	.052	.052
KY	2	2	1	1	9,023	3,008	.066	.066
LA	1	1	1	0	18,599	6,200	.016	.016
ME	0	0	0	0	1,523	508	0	0
MD	1	1	1	0	17,848	5,949	.017	.017
MA	0	0	0	0	8,345	2,782	0	0
MI	1	1	1	0	34,267	11,422	.009	.009
MN	0	0	0	0	3,176	1,059	0	0
MO	1	0	0	0	14,943	4,981	.020	0
MS	0	0	0	0	8,375	2,792	0	0
MT	0	0	0	0	1,425	475	0	0
NE	1	1	1	0	2,403	801	.125	.125
NV	0	0	0	0	5,322	1,774	0	0
NH	1	1	1	0	1,342	447	.224	.224
NJ	1	0	0	0	21,128	7,043	.014	0
NM	1	1	1	0	3,187	1,062	.094	.094
NY	6	4	4	0	54,895	18,298	.033	.022
NC	0	0	0	0	18,411	6,137	0	0
ND	0	0	0	0	483	161	0	0
OH	1	0	0	0	31,822	10,607	.009	0
OK	1	1	1	0	12,285	4,095	.024	.024
OR	1	1	0	1	6,492	2,164	.046	.046
PA	2	2	1	1	22,290	7,430	.027	.027
PR	2	2	2	0	N/A	N/A	N/A	N/A
RI	1	1	1	0	2,392	797	.125	.125
SC	1	1	1	0	17,319	5,773	.017	.017
SD	0	0	0	0	1,341	447	0	0
TN	1	1	0	1	10,388	3,463	.029	.029
TX	1	1	1	0	50,042	16,681	.006	.006
UT	2	1	0	1	2,496	832	.240	.120
VT	0	0	0	0	1,049	350	0	0
VA	0	0	0	0	17,593	5,864	0	0
WA	0	0	0	0	7,995	2,665	0	0
WV	1	1	1	0	1,565	522	.192	.192
WI	1	1	1	0	7,465	2,488	.040	.040
WY	0	0	0	0	1,110	370	0	0
Totals	52	40	33	7	710,383	236,794	.022	.016

*This chart is derived from Petitioners case citations and relates to the addendum to Respondent's brief analyzing the pre-ADA cases. This chart does not include any federal facilities.

OCT 27 2005

Nos. 04-1203 and 04-1236

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF GEORGIA, ET AL.

TONY GOODMAN, PETITIONER

v.

STATE OF GEORGIA, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER IN NO. 04-1203

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In the Supreme Court of the United States

No. 04-1203

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF GEORGIA, ET AL.

No. 04-1236

TONY GOODMAN, PETITIONER

v.

STATE OF GEORGIA, ET AL.

REPLY BRIEF FOR THE PETITIONER IN NO. 04-1203

Neither respondents nor their amici ask this Court to overrule its recent decisions in *Tennessee* v. *Lane*, 541 U.S. 509 (2004), and *Nevada Department of Human Resources* v. *Hibbs*, 538 U.S. 721 (2003). But, as evidenced by respondents' heavy reliance (Br. 29, 32, 34, 35, 37-38 n.10) on the *dissenting* opinions in those cases, this Court's *holdings* in *Lane* and *Hibbs* establish that Congress properly exercised its power under Section 5 of the Fourteenth Amendment to apply Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. 12131-12165, to prisons.

A. Prison Administration Is The Relevant Context

The as-applied analysis of Congress's Section 5 power that was prescribed by this Court in *Lane*, 541 U.S. at 530-534, properly focuses on the "class of cases" and "variety of * * * constitutional guarantees" implicated by the States' "administration of * * * the penal system." *Id.* at 522, 525, 531. Neither respondents nor their amici make any effort to defend the court of appeals' much narrower focus on the particular constitutional claim (the Eighth Amendment) that happened to be asserted in the first case that

court decided involving prison administration. *Miller* v. *King*, 384 F.3d 1248, 1272 (11th Cir. 2004); Pet. App. 19a. And with good reason: *Lane* made clear that the relevant context for its as-applied analysis was not the individual constitutional claim raised in the complaint—the complaints in *Lane* raised no constitutional claims at all, Pet. App. 12-28 (No. 02-1667)—but rather the entire "class of cases implicating the accessibility of judicial services." 541 U.S. at 531. Moreover, the Court considered the *full* range of constitutional concerns relevant to that entire substantive category of governmental activity, including those not implicated by the plaintiffs' own claims, such as the constitutional interest in access to the courts by civil litigants and jurors. That approach recognizes that Section 5 legislation (i) responds to and addresses not the isolated claims of future litigants, but broad "pattern[s]" of unconstitutional conduct by government officials in the substantive areas in which they operate, *Lane*, 541 U.S. at 526, and (ii) may prophylactically "proscribe[] facially constitutional conduct, in order to prevent and deter unconstitutional conduct," *Hibbs*, 538 U.S. at 727-728. See U.S. Br. 11-16.[1]

B. Title II Responds To A Long History And A Continuing Problem Of Unconstitutional Treatment Of Disabled Prisoners

Respondents' central argument (Br. 22-38) is that Congress lacked an adequate record of unconstitutional treatment of prisoners to apply Title II to the prison context. That is wrong for four reasons.

1. ***Lane held that Section 5 legislation is warranted.*** The short answer is that this Court held in *Lane* that the constitutional predicate for Congress's enactment of Title II as Section 5 legislation is "clear beyond peradventure."

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[1] Even if a narrower context were appropriate, respondents and their amici offer no response to the United States' alternative argument (Br. 47-48) that, at a minimum, Title II is constitutional as applied to Goodman's allegations concerning actual violations of the Constitution (see Pet. App. 16a-18a).

541 U.S. at 529. In *Lane*, this Court surveyed a broad array of evidence beyond the context of access to the courts to support its determination that Congress passed Title II in response to an established record "of pervasive unequal treatment [of individuals with disabilities] in the administration of state services and programs, including systematic deprivations of fundamental rights." *Id.* at 524; see *id.* at 524-526 (discussing the history and evidence of discrimination in, *inter alia*, voting, marriage, unjust commitment and institutionalization, public education, and the penal system). The Court then concluded that "the sheer volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities," *id.* at 528, combined with Congress's express findings of discrimination in areas that are the exclusive or predominant domain of state governments, *id.* at 529; see 42 U.S.C. 12101(a)(3), "make[] clear beyond peradventure that inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation," *Lane*, 541 U.S. at 529. It was only in the next step of the Court's Section 5 analysis—a separately designated section of the opinion assessing whether "Title II is an appropriate response to this history and pattern of unequal treatment," *id.* at 541 U.S. at 530—that the Court even discussed an as-applied approach or precedents like *United States* v. *Raines*, 362 U.S. 17 (1960). The Court then restricted "the scope of that inquiry," *Lane*, 541 U.S. 530, to the context of access to the courts, *id.* at 530-531.

Respondents contend (Br. 20-21) that neither Congress nor this Court focused on the prison context. Quite the opposite, *Lane* concluded that the "pattern of unequal treatment" identified by Congress includes "administration of * * * the penal system," 541 U.S. at 525, and cited prison cases that documented that pattern, *id.* at 525 n.11. Congress also specifically found that "institutionalization" was

one "critical area[]" in which "discrimination * * * persists." 42 U.S.C. 12101(a)(3). That targeted finding can naturally "be thought to include penal institutions." *Pennsylvania Dep't of Corrs.* v. *Yeskey*, 524 U.S. 206, 212 (1998). Indeed, Congress employed the same terminology in the Civil Rights of Institutionalized Persons Act, 42 U.S.C. 1997 *et seq.*, where it defined the "institutions" that house "institutionalized persons" to include a State or local "jail, prison, or other correctional facility," or "a pretrial detention facility," 42 U.S.C. 1997(1)(B)(ii), (iii), and Subch. I-A (title).[2]

2. ***The record is substantial.*** Even were the Court to re-open *Lane*'s holding concerning the predicate for Congress's exercise of its Section 5 power, ample evidence corroborates the appropriateness of applying Title II to prisons. See U.S. Br. 16-35; Goodman Br. 20-36; Paralyzed Veterans Br. 7-13; ADAPT Br. 9-22; American Ass'n on Mental Retardation Br. 15-20. Notably, while respondents criticize various pieces of evidence, they do not actually deny the *reality* of the Nation's "history of unfair and often grotesque mistreatment" of persons with disabilities, *City of Cleburne* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432, 438 (1985), nor could they. U.S. Br. 16-17 & n.8. Nor do they deny the *reality* that Congress and the courts have, time and again, documented the unconstitutional treatment of disabled prisoners. See, *e.g.*, U.S. Br. 24-32 & Add. A; see also R. Fleischner & M. Cutler, *Annotated List of Cases Relating to Treatment for Persons with Mental Illness in Prisons & Jails* (Dec. 2002), at <http://www.centerforpublicrep. org/cgi-bin/pdf.pl?id=97283>. Instead, respondents proffer a series of rules that would force this

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[2] See Religious Land Use and Institutionalized Persons Act, 42 U.S.C. 2000cc-1(a) (same definition); 20 U.S.C. 6421(a)(2) and (3) (2000 & Supp. II 2002) ("institutionalization" includes "correctional facilities"); 42 U.S.C. 5633(a)(9)(A) and (F)(i) (2000 & Supp. II 2002) ("institutionalization" of juvenile delinquents); 29 U.S.C. 701(a)(5); *Yeskey*, 524 U.S. at 209 (Title II "unmistakably includes State prisons and prisoners within its coverage").

Court to disregard "the stuff of actual experience" that prompted congressional action, *United States* v. *Gainey*, 380 U.S. 63, 67 (1965), and constrain its review to an artificial subset of judicially depurated material. Not one of respondents' proposed rules for disallowing actual experience comports with controlling precedent or common sense.[3]

First, respondents insist (Br. 35) that the Court must disregard all evidence of unconstitutional treatment by political subdivisions of the States. *Lane*, in which both respondents had been denied access to "county courthouses," 541 U.S. at 513-514, held the opposite, *id.* at 527 & n.16.

Respondents rely (Br. 35) on the statement in *Board of Trustees of the University of Alabama* v. *Garrett*, 531 U.S. 356, 369 (2001), that evidence of discrimination by local units of government should be discounted because Congress may subject them to damages suits without relying on its Section 5 power. But *Lane* distinguished *Garrett* on this point, noting that a rule disallowing evidence involving local government officials could not be reconciled with *South Carolina* v. *Katzenbach*, 383 U.S. 301, 312-315 (1966), or *Hibbs*. See *Lane*, 541 U.S. at 527-528 n.16. In addition, the employment provisions in Title I of the ADA at issue in *Garrett* independently sustainable under the Commerce Clause, so that "the sole purpose of reliance on § 5 [was] to place the States on equal footing with private actors with respect to their amenability to suit." *Id.* at 528 n.16. Title II, by contrast, specifically focuses on the operations of state and local governments *qua* governments. Moreover, respondents and numerous other States have argued that Title II is not proper Commerce Clause legislation as applied to prisons, *Miller*, 384 F.3d at 1268 n.23; Nevada, Georgia, *et al.* Amicus Br. at 7-8, *Pennsylvania Dep't of Corrs.* v. *Yeskey*, (No. 97-634). This case thus draws into question the *substantive*

[3] To the extent the Court considers it relevant, the appendix to this brief contains a case-by-case response to respondents' appendix.

power of Congress to remedy and deter a documented pattern of unconstitutional treatment of disabled inmates by both States and local governments, regardless of whether the law is enforced through private damages actions, private injunctive actions, or by the United States itself. That makes the actions of local governments clearly relevant. See *Lane*, 541 U.S. at 527-528 n.16; *City of Boerne* v. *Flores*, 521 U.S. 507, 530-531 (1997); *South Carolina*, 383 U.S. at 308-313 (1966).

Finally, respondents' effort to distinguish *Lane* on this point fails for the additional reason that local jails, like local courthouses, often serve as arms of the state, and the interchange of prisoners and shared use of facilities between state and local authorities is commonplace. See U.S. Br. 18 n.9. Under those circumstances, Congress's enforcement power under Section 5, like the substantive protections of Section 1, can charge the States with some responsibility for the unconstitutional conduct of the political subdivisions that the States themselves created and empowered to act, and with which they coordinate prison programs and services.

Second, respondents variously complain (Br. 25-26, 30-31) that the testimony, reports, studies, and cases that substantiate the problem of unconstitutional treatment of disabled prisoners came either too early or too late. *Lane* and *Hibbs* are to the contrary. In *Lane*, the Court expressly and repeatedly relied on material documenting unconstitutional treatment of the disabled that predated Title II by more than respondents' proposed seven-year cutoff (Br. 26) or postdated its enactment. See 541 U.S. at 524-527 & nn.5-14. For example, two of the cases the Court cited in *Lane* to "document a pattern of unequal treatment in * * * the penal system" postdated the ADA. *Id.* at 525 n.11. The Court did the same in *Hibbs*, relying on cases that predated the Family and Medical Leave Act, 29 U.S.C. 2601 *et seq.*,

by more than a century and others, like *United States* v. *Virginia*, 518 U.S. 515 (1996), that postdated its enactment, and legislative materials that also ran afoul of respondents' seven-year cutoff. See *Hibbs*, 538 U.S. at 729-730, 733-734 & nn.3, 6-9.

Respondents, moreover, offer no rationale for their proposed head-in-the-sand approach to "the gravest and most delicate duty that this Court is called upon to perform." *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981). After all, evidence of unconstitutional treatment spanning a substantial breadth of time would seem to be the very definition of a "history and pattern" of constitutional violations. *Garrett*, 531 U.S. at 368. Moreover, with respect to information that predates the enactment of Title II, it would be an odd conception of federalism that considered Congress's lengthy study of a problem and willingness to proceed incrementally to be marks against the law's constitutionality. With respect to material that postdates Title II's enactment, respondents fail to explain why evidence of an enduring problem does not substantiate Congress's finding of an antecedent problem. Indeed, the fact that violations continue to occur would seem to undermine respondents' argument for discounting pre-enactment evidence, because it demonstrates that earlier laws, and even Title II, have not eradicated the problem.

Third, respondents (Br. 34-35) and Tennessee argue (Amici Br. 14-18) that only final adjudications of constitutional violations by the States can support an exercise of Congress's Section 5 power, and even then only if there are sufficiently numerous adverse court judgments to meet some unspecified adjudications-per-capita threshold (*id.* Br. 17-18), and if the legislation is targeted solely at adjudicated offending States (*id.* at 17). That argument is irreconcilable with precedent. The Court, for example, upheld *nationwide* bans on literacy tests and durational residency require-

ments after the Court had repeatedly affirmed the constitutionality of such procedures.[4] Likewise, the Court broadly sustained the Voting Rights Act of 1965 in *South Carolina*, *supra*, even though there were far fewer than "40 cases" finding unconstitutional discrimination in voting, and then only by nine States "over decades" (*id.* 18), making the ratio of violations to the number of eligible African American and other minority voters (*id.* at 17-18) infinitesimally small.[5]

The argument also ignores that the absence of adjudicated violations may reflect the courts' own failure to recognize the problem. See, *e.g.*, *Buck* v. *Bell*, 274 U.S. 200 (1927); see also *Hibbs*, 538 U.S. at 729 (noting that historical discrimination "is chronicled in—and, until recently, was sanctioned by—this Court's opinions"). For example, Congress extended Title VII's ban on gender discrimination to the States, Pub. L. No. 92-261, § 2, 86 Stat. 103 (1972), just four months after, "for the first time in our Nation's history, this Court ruled in favor of a woman who complained that

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[4] Compare *Oregon* v. *Mitchell*, 400 U.S. 112 (1970) (upholding bans), with *Drueding* v. *Devlin*, 380 U.S. 125 (1965) (mem.) (upholding residency requirements); *Carrington* v. *Rash*, 380 U.S. 89, 91 (1965) (same); *Lassiter* v. *Northampton County Bd. of Elections*, 360 U.S. 45 (1959) (literacy test upheld).

[5] We have found only 18 final judgments of unconstitutional voting discrimination by the States before 1965. See *Anderson* v. *Martin*, 375 U.S. 399 (1964); *Terry* v. *Adams*, 345 U.S. 461 (1953); *Smith* v. *Allwright*, 321 U.S. 649 (1944); *Lane* v. *Wilson*, 307 U.S. 268 (1939); *Nixon* v. *Condon*, 286 U.S. 73 (1932); *Nixon* v. *Herndon*, 273 U.S. 536 (1927); *Myers* v. *Anderson*, 238 U.S. 368 (1915); *Guinn* v. *United States*, 238 U.S. 347 (1915); *Alabama* v. *United States*, 304 F.2d 583 (5th Cir.), aff'd, 371 U.S. 37 (1962); *McDonald* v. *Key*, 224 F.2d 608 (10th Cir.), cert. denied, 350 U.S. 895 (1955); *Butler* v. *Thompson*, 184 F.2d 526 (4th Cir. 1950); *Baskin* v. *Brown*, 174 F.2d 391 (4th Cir. 1949); *Rice* v. *Elmore*, 165 F.2d 387 (4th Cir. 1947), cert. denied, 333 U.S. 875 (1948); *Chapman* v. *King*, 154 F.2d 460 (5th Cir.), cert. denied, 327 U.S. 800 (1946); *Bliley* v. *West*, 42 F.2d 101 (4th Cir. 1930); *Hamm* v. *Virginia State Bd. of Elections*, 230 F. Supp. 156 (E.D. Va.), aff'd, 379 U.S. 19 (1964); *United States* v. *Louisiana*, 225 F. Supp. 353, 396 (E.D. La. 1963), aff'd, 380 U.S. 145 (1965); *Davis* v. *Schnell*, 81 F. Supp. 872 (S.D. Ala.), aff'd, 336 U.S. 933 (1949).

her State had denied her the equal protection of its laws" in a non-employment case. *Virginia*, 518 U.S. at 532 (citing *Reed* v. *Reed*, 404 U.S. 71 (1971)). Title VII's legislative record contains no specific data or findings regarding women employees in state or local governments,[6] and we have uncovered only *one* case before 1972 that actually found unconstitutional employment discrimination on the basis of gender by a State. See *Thorn* v. *Richardson*, No. 9577, 1971 WL 201 (W.D. Wash. 1971).

Respondents' and their amici's approach also would require overruling *Hibbs*. There, the Court rejected the dissent's emphasis on Nevada's own benefit policies, which predated the federal enactment, and instead found that Congress "could reasonably conclude" that nationwide remedial legislation was justified, "no matter how generous petitioner's own [policies] may have been." 538 U.S. at 734.[7] The Court reached that conclusion, moreover, despite the

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[6] See H.R. Rep. No. 238, 92d Cong., 1st Sess. (1971); S. Rep. No. 415, 92d Cong., 1st Sess. (1971); 118 Cong. Rec. 1840 (1972) (Sen Javits) (only "overall figures" for sex discrimination); *id.* at 1816-1819; *id.* at 4935. The isolated references to gender discrimination noted only that the Constitution prohibits such discrimination, S. Rep. No. 415, *supra*, at 10; 118 Cong. Rec. at 1816 (Sen. Williams); *id.* at 1412 (Sen Byrd). Congressional hearings on the 1972 amendments were equally silent. See *Equal Employment Opportunities Enforcement Act of 1971: Hearings on S. 2215, S. 2617, & H.R. 1746 Before the Subcomm. on Labor of the Senate Comm. on Labor & Pub. Welfare*, 92d Cong., 1st Sess. (1971); *Equal Employment Opportunity Enforcement Procedures: Hearings on H.R. 1746 Before the Gen. Subcomm. on Labor of the House Comm. on Educ. & Labor*, 92d Cong., 1st Sess. (1971); *Equal Employment Opportunity Enforcement Procedures: Hearings on H.R. 6228 & H.R. 13517 Before the Gen. Subcomm. on Labor of the House Comm. on Educ. & Labor*, 91st Cong., 1st & 2d Sess. (1969-1970); *Equal Employment Opportunities Enforcement Act: Hearings on S. 2453 Before the Subcomm. on Labor of the Senate Comm. on Labor & Pub. Welfare*, 91st Cong., 1st Sess. (1969).

[7] See also *Lopez* v. *Monterey County*, 525 U.S. 266 (1999); *City of Rome* v. *United States*, 446 U.S. 156, 174 (1980).

dearth of adverse final judgments against States for unconstitutional family-leave policies.

Further amici's adjudicated-violations-per-capita approach cannot be squared with the original purpose of Section 5, which was not to leave the protection of liberties so completely dependent upon the same federal judiciary that, less than a decade earlier, had constricted congressional power to contain the spread of slavery, see *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869); *Dred Scott* v. *Sandford*, 60 U.S. (19 How.) 393, 436-452 (1857), or to relegate Congress to enforcing only those rights that the courts were already doing a good job of policing. Under Section 5, "[i]t is not * * * the *judicial power*" but "the power of Congress which has been enlarged." *Ex parte Virginia*, 100 U.S. 339, 345 (1879). Amici's argument also overlooks that a single case against a State (especially a class action) may expose hundreds of constitutional violations, the worst offending cases may settle, and a central purpose of Section 5 legislation is to remedy and prevent the forms of discrimination that are least amenable to courtroom proof, *e.g.*, *Hibbs*, 538 U.S. at 736.[8]

In short, respondents' focus (Br. 30) on the materials before Congress "in 1990" asks the wrong question. The appropriateness of Section 5 legislation turns upon whether a problem of unconstitutional treatment exists, not whether a long series of widely dispersed judicial adjudications or an elaborate legislative history exists.

Fourth, respondents criticize (Br. 23-24) the lack of specificity in the testimony of a single witness before Congress, Cindy Miller of Massachusetts, who testified that

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[8] The insistence upon final judgments loses sight of the fact that a preliminary injunction reflects the prisoner's "substantial likelihood of success on the merits," *Benten* v. *Kessler*, 505 U.S. 1084, 1085 (1992) (per curiam), and a denial of summary judgment means that a reasonable factfinder—whether a judge, jury, or Congress—could find unconstitutional treatment of the prisoner, *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248-249 (1986).

"jailers rational[ize] taking away [inmates'] wheelchairs as a form of punishment as if that is different than punishing prisoners by breaking their legs." Respondents insist that the "rehabilitation counselor['s]" testimony must have referred to the treatment of residents in a state mental health hospital rather than in a state prison. But it is not clear that respondents' purported distinction is even meaningful. "[R]ehabilitation counselor[s]" routinely work in correctional facilities as well as mental health institutions, see, *e.g.*, *Spicer* v. *Virginia, Dep't of Corrs.*, 66 F.3d 705, 707 (4th Cir. 1995) (en banc), and in many States (including Massachusetts), mentally ill prisoners may serve their sentences within mental health institutions.[9]

In addition, even if that *one* witness's testimony were ambiguous, it would not alter the very specific judicial confirmation of the same point (including a Massachusetts case)[10] and the sheer volume of other evidence of unconstitutional treatment. Respondent and their amici simply ignore

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[9] See U.S. Br. 32 n.27; Mass. Gen. Laws Ann. ch. 123, §§ 1, 13, 14, 18 (West 2003); Reply App., *infra*, 4a, 8a, 11a, 23a; *Vitek* v. *Jones*, 445 U.S. 480 (1980); John Monahan, et al., "Prisoners Transferred to Mental Hospitals," in *Mentally Disordered Offenders: Perspectives from Law and Social Science* 233-244 (John Monahan & Henry J. Steadman eds., 1983).

[10] See *Navedo* v. *Maloney*, 172 F. Supp. 2d 276 (D. Mass. 2001) (prisoner denied access to his wheelchair); see also *Serrano* v. *Francis*, 345 F.3d 1071 (9th Cir. 2003) (inmate in disciplinary unit denied wheelchair, forcing him to crawl around vermin and cockroach-infested floor), cert. denied, 125 S. Ct. 43 (2004); *Hicks* v. *Frey*, 992 F.2d 1450 (6th Cir. 1993) (paraplegic in disciplinary unit denied wheelchair); *Weeks* v. *Chaboudy*, 984 F.2d 185, 187 (6th Cir. 1993) ("squalor in which [prisoner] was forced to live as a result of being denied a wheelchair" violated the Eighth Amendment); *Schmidt* v. *Odell*, 64 F. Supp. 2d 1014 (D. Kan. 1999) (inmate deprived of wheelchair); *Beckford* v. *Irvin*, 49 F. Supp. 2d 170 (W.D.N.Y. 1999) (Eighth Amendment violated by same); *Harrelson* v. *Elmore County*, 859 F. Supp. 1465, 1466 (M.D. Ala. 1994) (paraplegic prisoner denied use of a wheelchair and forced to crawl around cell); cf. *Parkinson* v. *Columbia County Dist. Att'y*, 679 N.Y.S.2d 505 (Sup. Ct. 1998) (Constitution violated where inmate was deprived of prosthetic leg for at least a year).

the evidence that (i) persons with disabilities are "deprived of medications while in jail," H.R. Rep. No. 485, 101st Cong., 2d Sess. Pt. 3, at 50 (1990); (ii) "Kentucky Corrections offers no appropriate treatment to the retarded and subjects them to varied institutional abuse";[11] (iii) "[m]edical care at best in most State systems barely scratches the surface of constitutional minima";[12] (iv) inmates with the most serious medical problems "get dumped" into higher security facilities regardless of whether their crimes or behavior warrant it;[13] (v) "the confinement of inmates who are in need of psychiatric care and treatment * * * in the so called psychiatric unit of the Louisiana State Penitentiary constitutes cruel and unusual punishment in violation of the Eighth Amendment";[14] (vi) mentally ill prisoners were deprived of nutritional food because "mental cases don't know what they eat anyway";[15] and (vii) there have been repeated instances of deliberate abuse and gross medical maltreatment causing dangerous infections, maggot-infested wounds, and the deaths of disabled inmates, see U.S. Br. 24-

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[11] Kentucky Legis. Research Comm'n, *Research Report No. 125: Mentally Retarded Offenders in Adult and Juvenile Correctional Institutions* at A-3 (1975).

[12] *AIDS and the Admin. of Justice: Hearing Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary*, 100th Cong., 1st Sess. 39 (1987).

[13] Cathy Potler, Correctional Ass'n of N.Y., *State of the Prisons: Conditions Inside the Walls* 12-13 (1986); see J.A. 90; U.S. Br. 28-29.

[14] *Civil Rights for Institutionalized Persons: Hearings on H.R. 2439 & H.R. 5791 Before the Subcomm. on Courts, Civil Liberties, & the Admin. of Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 320-321 (1977).

[15] *Civil Rights of Institutionalized Persons: Hearings on S. 1393 Before the Subcomm. on the Const. of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 234 (1977) (*S. 1393 Hearings*).

25 & n.19. With respect to that evidence, the silence of respondents and their amici speaks volumes.[16]

3. ***The type of violations warrants congressional action.*** Rather than answer that extensive evidence—the volume and specificity of which far exceeds the records in *Lane* and *Hibbs*—respondents argue (Br. 10-19) that it must all be ignored because the constitutional claims of prisoners are subjected to rational-basis review. The premise is wrong. The rights of disabled prisoners to adequate medical care, humane conditions of confinement, protection from violence, and prison terms that are not lengthened or served under inordinately harsh conditions, see J.A. 90; U.S. Br. 21-30, are protected by more than the any-conceivable-rational-basis standard. Furthermore, prisoners have a "fundamental constitutional right of access to the courts" to challenge their convictions or conditions of confinement, *Lewis* v. *Casey*, 518 U.S. 343, 346 (1996), and the Constitution's protection of that right is at least as robust as the general public's (*i.e.*, *Lane* respondent Jones's) right to observe court proceedings. Indeed, because prison administration is an area in which the "government exerts a degree of control unparalleled in civilian society," *Cutter* v. *Wilkinson*, 125 S. Ct. 2113, 2121 (2005), and deprives disabled inmates of the resources, freedom, and physical capacity to meet their own needs, the Constitution's attentiveness to state conduct is heightened and pervasive.

Respondents' reliance (Br. 14-19) on *Turner* v. *Safley*, 482 U.S. 78 (1987), misunderstands the operation of both

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[16] Respondents' search (Resp. Br. 24 & n.8) of Westlaw's (incomplete) computerized legislative history of the ADA reveals the pitfalls of artificially narrow, word-specific search requests. Respondents failed to look for the terms Congress employed. Had they searched for "jail," "inmate," or "correctional," they would have found the specific consideration of Title II's application to prison administration that they seek. See U.S. Br. 21-23, 28; 136 Cong. Rec. 17,039 (1990) (reproducing federal Bureau of Prisons' guidance on the management of HIV-positive prison inmates).

that standard and Title II. As this Court underscored just last Term, the *Turner* standard of review applies "*only* to rights that are inconsistent with proper incarceration." *Johnson* v. *California*, 125 S. Ct. 1141, 1149 (2005). Moreover, even when *Turner* calls for deference, it provides for more searching review than rational-basis scrutiny, as *Turner* itself demonstrates, see 482 U.S. at 94-99 (striking down marriage restrictions). Title II, moreover, does not mandate the creation of new programs or services. It requires only that qualified individuals with disabilities be afforded equivalent access to whatever programs and services the prison already offers, 42 U.S.C. 12132. When the State determines that certain accommodations of constitutional rights are perfectly consistent with incarceration, but makes them unavailable to qualified inmates with disabilities, the State's action is not saved by *Turner*. Indeed, in that context, the judgments for which *Turner* suggests that deference is appropriate will rarely be implicated. Likewise, the Court's Eighth Amendment jurisprudence recognizes that the pervasive control the State exercises over prisoners imposes unique affirmative duties on the States and does not broadly permit the State to engage in any conduct for which a rationale could be hypothesized.

Respondents' argument also misunderstands the function of deferential judicial scrutiny under *Turner*. *Turner* recognizes that state action implicating and possibly violating the Constitution is pervasive in prisons, but nevertheless prescribes a measure of judicial restraint in evaluating prison policies out of concerns for both federalism and the separation of powers. However, both of those concerns have substantially reduced force when Congress acts under Section 5 of the Fourteenth Amendment. Further, to transform *Turner*'s expression of judicial restraint and respect for the legislative process into a judicial sword that would preclude Congress from responding, under Section 5 of the Four-

teenth Amendment, even to a proven record of constitutional violations would get the Constitution's structural principles exactly backwards.

4. ***Title II is not underinclusive***. Respondents contend (Br. 27-29, 31-33) that the extensive evidence of violations of disabled inmates' Eighth Amendment rights must be discounted because the States were simultaneously violating the constitutional rights of non-disabled inmates, rendering Title II "underinclusive[]" (*id.* at 44). That argument largely answers itself. It would be an odd version of federalism that deemed a congressional response to only one species of constitutional violations to be suspect, or that allowed States to insulate themselves from targeted Section 5 legislation by violating an even broader swath of constitutional rights. Congress, moreover, could reasonably conclude that Eighth Amendment violations disproportionately endanger the lives and physical safety of inmates with disabilities, given their often enhanced vulnerability to prison conditions in general, and to the deprivation of adequate medical care in particular. Congress, likewise, could (and did) conclude that the unconstitutional treatment of *inmates* with disabilities was an integral part of the broader problem of the States' improper treatment of *Americans* with disabilities.

Respondents' companion argument (Br. 27-29) that Title II is unconcerned with Eighth Amendment violations because they are not a form of "discrimination" is without basis. The concepts of inequitable treatment and inhumane treatment overlap. When prison officials deny inmates with disabilities access to toilet facilities or subject them to a substandard diet because "mental cases don't know what they eat anyway," *S. 1393 Hearings* 234, they discriminate against disabled inmates with respect to the minimal conditions guaranteed by the Eighth Amendment. Indeed, this Court held in *Lane* that Title II enforces not just the constitutional prohibition on "irrational disability discrimination,"

but also remedies and prevents violations of "other basic constitutional guarantees." 541 U.S. at 522 (citing cases implicating Eighth Amendment rights). And that aspect of Title II added to, rather than detracted from, its constitutionality. Beyond that, respondents' observation (Br. 22-23) that Title II promotes mainstreaming overlooks that (i) Congress also unambiguously expressed its desire to combat discrimination in "institutionalization," 42 U.S.C. 12101(a)(3); *Yeskey*, *supra*; (ii) Title II promotes the mainstreaming of disabled prisoners within prison life; and (iii) the vast majority of disabled inmates "will eventually return to society," *McKune* v. *Lile*, 536 U.S. 24, 36 (2002) (plurality), so that their inclusion in prison rehabilitative programs and other institutional services directly promotes their later transition into the mainstream of community life.

C. Title II Is Reasonably Tailored To Remedying And Preventing Constitutional Violations in the Prison Context

Respondents contend (Br. 38-44) that Title II is not congruent and proportional because it goes too "far beyond the Constitution's requirements" (Br. 40). As an initial matter, that argument is hard to reconcile with respondents' complaint elsewhere (Br. 27-29, 31-33, 44) that Title II is "underinclusive" because it does not address more constitutional violations committed by the States.

In any event, while some applications of Title II might provide stronger procedural and substantive protection than the Constitution mandates, Section 5 permits that. "Congress' § 5 power is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment." *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 81 (2000). Rather, Congress may both remedy past violations of constitutional rights and enact "prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct," *Hibbs*, 538 U.S. at 727-728.

Respondents and their amici also fail to show that the gap between the Constitution and Title II as applied to prisons is materially different from the gap between Title II and the various constitutional rights of access to the courts upheld in *Lane*. The features of Title II that this Court emphasized in upholding its application to the courts apply with full force in the prison context. Title II does not impose inflexible commands, but rather requires only that States undertake "reasonable measures," *Lane*, 541 U.S. at 531, and "reasonable" accommodations and modifications, *id.* at 532; 42 U.S.C. 12131(2), to ensure only that otherwise "qualified individual[s]" with disabilities, 42 U.S.C. 12132, be afforded reasonable access to programs and services that the State independently has determined are consistent with incarceration. Title II does not require States to abandon their essential eligibility criteria for prison programs, to "fundamentally alter the nature of the service provided," or to incur "undue financial or administrative burden[s]." *Lane*, 541 U.S. at 532; 28 C.F.R. 35.130(b)(7), 35.150(a)(3). Those requirements echo the general mandate of "reasonableness" in prison regulations, *Turner*, 482 U.S. at 89; and the States' obligations to refrain from imposing "atypical and significant hardship[s]," *Wilkinson* v. *Austin*, 125 S. Ct. 2384, 2395 (2005), and to provide "humane conditions of confinement," "adequate food, clothing, shelter, and medical care," and "reasonable measures to guarantee [prisoners'] safety," *Farmer* v. *Brennan*, 511 U.S. 825, 832 (1994).

Indeed, Title II's flexible commands are, if anything, a more reasonable and "appropriate response to [a] history and pattern of unequal treatment," *Lane*, 541 U.S. at 530, in the prison context than in the court-access context. First, to the extent Title II imposes affirmative duties of accommodation on States, those duties are more congruent and proportional within prison walls, where (unlike most other contexts) affirmative obligations under the Constitution

itself are the rule, rather than the exception. See, *e.g.*, *DeShaney* v. *Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989). Second, courts have been particularly receptive to the need to provide an appropriate degree of deference to prison officials, even in applying statutory and constitutional standards that are facially more rigorous. See, *e.g.*, *Cutter*, 125 S. Ct. at 2123, *Johnson*, 125 S. Ct. at 1152. And a number of courts have recognized that Title II's terms permit reasonable deference to prison administrators.[17] If doubt remains, courts should construe Title II to preserve its constitutionality. *E.g.*, *Harris* v. *United States*, 536 U.S. 545, 555 (2002); *Ashwander* v. *TVA*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring).

Furthermore, Title II's standards, see 42 U.S.C. 12134(b), largely mirror those that the Rehabilitation Act of 1973, 29 U.S.C. 794 (2000 & Supp. II 2002), imposes upon the federal government, which operates the largest correctional system in the Nation, and all fifty States, which have voluntarily chosen to accept federal funding that triggers that Act's requirements. If those standards failed to accord sufficient deference to the unique needs of the prison context or if, in fact, they "mark[ed] the end of deference to State prison operations" that amici portend (Tenn. Br. 6), then presumably some evidence of those problems would have surfaced in the federal system or in the States in the decades since the Rehabilitation Act and Title II were en-

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[17] See *Bowman* v. *Beasley*, 8 Fed. Appx. 175, 179 (4th Cir. 2001) (per curiam) ("wide deference"), cert. denied, 535 U.S. 1001 (2002); *Armstrong* v. *Davis*, No. 99-15152, 2000 WL 369622, at *1 (9th Cir. Apr. 11, 2000) (mem.) (*Turner*-style deference); *Oneisha* v. *Hopper*, 171 F.3d 1289, 1300 (11th Cir. 1999) (en banc) (deferring to "penological concerns"), cert. denied, 528 U.S. 1114 (2000); *Randolph* v. *Rodgers*, 170 F.3d 850 (8th Cir. 1999); *Couvillion* v. *Michigan Parole Bd.*, No. 4:04-CV-130, 2005 WL 1036973, at *6 (W.D. Mich. May 4, 2005); *Brooks* v. *Horn*, No. 00-03637, 2004 WL 764385, at *9 (E.D. Pa. Apr. 7, 2004); see also *Gates* v. *Rowland*, 39 F.3d 1439, 1447 (9th Cir. 1994) (applying *Turner*-style deference under Section 504 of the Rehabilitation Act).

acted.[18] But neither respondents nor their amici cite any and, in fact, they all continue to accept federal funding for their prisons. All Title II does is extend those workable standards to every level of correctional facility and to each prisoner with a qualifying disability within a State.

Amici's concern (Br. 26) that Title II will "spur more prison litigation" suffers from the same flaws. Indeed, just last Term, the Court rejected the identical argument with respect to the protections for prisoners' religious freedom required by the Religious Land Use and Institutionalized Persons Act—protections that can potentially be invoked by *every* prisoner and that subject state justifications to statutory *strict scrutiny*, 42 U.S.C. 2000cc-1(a)(1) and (2). In *Cutter*, the Court saw "no reason to anticipate that abusive prisoner litigation will overburden the operations of state and local institutions," and noted that the Prison Litigation Reform Act of 1995 (PLRA), 42 U.S.C. 1997e, was "designed to inhibit frivolous filings." 125 S. Ct. at 2124-2125. In fact, while the State of Washington now joins a brief labeling the PLRA a "facile assurance" (Tenn. Br. 25), Washington took a decidedly different view last Term when it told this Court that frivolous prisoner suits are "best addressed through legislation like the PLRA," rather than the denial of substantive civil rights protection. New York & Washington Amicus Br. at 16, *Cutter* v. *Wilkinson* (No. 03-9877). If, as Washington argued last year (*id.* at 2-3, 15), RLUIPA's *strict scrutiny* standard is a workable and appropriately deferential standard for accommodating religion in prisons, it is hard to understand the insistence this year that Title II's *reasonableness* standard is an unworkable standard for accommodating disabilities (unless accompanied by federal

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[18] Every State receives federal funding for its prisons. See *Cutter*, 125 S. Ct. at 2118-2119 n.4; *FY 2004 Office of Justice Programs, Office on Violence Against Women & Office of Community Oriented Policing Services: Grants by State* (visited Oct. 26, 2005) <http://www.ojp.gov/ fy2004grants>.

funding, at which point the standard apparently becomes acceptable again).

Finally, amici argue (Br. 24-25) that allowing damages is not appropriate. But amici make no effort to explain why damages here—which echo the damages relief already available against States under the Rehabilitation Act, *Barnes* v. *Gorman*, 536 U.S. 181, 184-187 (2002)—are less appropriate than they were under Title II in *Lane*, or under the Family and Medical Leave Act in *Hibbs*, 538 U.S. at 740. The "gravity of the harm" that past violations have caused, *Lane*, 541 U.S. at 523 —some of which have led to the physical suffering and deaths of prisoners, see U.S. Br. 24-29 & Add. A and B—strongly counsels in favor of equivalent enforcement authority in this context. Indeed, this Court has held that damages are an appropriate remedy to address the violation of constitutional rights in the cause of action created by *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 395 (1971). *A fortiori*, it is appropriate for Congress to make that same judgment in exercising its Section 5 power.

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For the foregoing reasons, and for those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

OCTOBER 2005

REPLY APPENDIX

Detailed Annotation of Cases Evidencing the Problem of Unconstitutional Treatment of Individuals with Disabilities in Correctional Facilities

Case	Respondents' Assertions	United States' Response
Balla v. *Idaho State Bd. of Corrs.*, 595 F. Supp. 1558 (D. Idaho 1984)	• Conflates universal deficiencies in medical or psychiatric care with disability-based discrimination.	• See U.S. Reply Br. at 15-16. • Court observed that psychiatric care at prison was "almost nonexistent," 595 F. Supp. at 1568, and that "the attitude of the Department with regard to psychiatric care can be described as deliberately indifferent," *ibid.*, with little or no care given to inmates with serious mental illnesses, *id.* at 1569. Failure to provide needed diet to diabetic had contributed to rendering him blind, *id.* at 1574-1575, and had contributed to another prisoner's seizures and to another's hospitalization for relapse of Crohn's Disease, *ibid.*

Case	Respondents' Assertions	United States' Response
Battle v. *Anderson*, 376F. Supp. 402 (E.D. Okla. 1974), aff'd in part and rev'd in part on other grounds, 993 F.2d 1551 (10th Cir. 1993) (reversing only as to district court's denial of two motions to intervene)	• Challenge to general prison conditions. • Conflates universal deficiencies in medical or psychiatric care with disability-based discrimination. • Inmates' claims of deficient prison conditions swept much more broadly than mental health care, encompassing issues such as law library access and religious practice. Deficiencies in medical care were systemic. Court denied money damages.	• See U.S. Reply Br. at 15-16. • The court specifically noted that half of the prison's in-patient population was hospitalized for psychiatric reasons, that "there is no professional psychiatric staff available for treatment on a regular basis," and the "only treatment" is "sedation." 376 F. Supp. at 415. The court's injunction included detailed provisions concerning medical care. See *id.* at 434.
Bee v. *Greaves*, 744 F.2d 1387 (10th Cir. 1984), cert. denied, 469U.S. 1214 (1985)	• Not decided on the merits. • County jail. • Inmate's forcible-medication claim arose after he initially requested medication. Court held that liberty interest in avoiding unwanted treatment is not absolute.	• See U.S. Reply Br. at 5-6, 7-10, 15-16; *Tennessee* v. *Lane*, 541 U.S. at 527-528 n.16. • Regardless of the fact that the inmate initially demanded medication, the issue was whether forcibly medicating him later was a non-exaggerated response to an emergency situation, 744 F.2d at 1395-1397, and the court found that the evidence in the inmate's favor was sufficient to defeat summary judgment, *ibid.*

Case	Respondents' Assertions	United States' Response
Bonner v. *Arizona Dep't of Corrs.*, 714 F. Supp. 420 (D. Ariz. 1989)	• Not decided on the merits. • Court rejected plaintiff inmate's argument that he had a due process liberty interest in avoiding protective lockdown.	• See U.S. Reply Br. at 7-10. • While the court held that the deaf, mute, and vision-impaired plaintiff had no due process liberty interest in avoiding protective lockdown, it also held that the plaintiff had a constitutional interest in not being removed from the prison's honor dorm. 714 F. Supp. at 424-425. Court found a genuine issue of material fact as to whether "requir[ing] a deaf, mute, and vision-impaired inmate to navigate this legal miasma without a qualified interpreter" prevented him from understanding the disciplinary proceedings that removed him from the dorm. *Id.* at 425; see *id.* at 423.
Bonner v. *Lewis*, 857 F.2d 559 (9th Cir. 1988)	• Not decided on the merits. • Court affirmed grant of summary judgment to defendant on inmate's equal protection and Eighth Amendment claims.	• See U.S. Reply Br. at 7-10. • Though affirming the dismissal of certain of the inmate's claims, the court made clear that a genuine issue of material fact existed as to "whether the denial of a qualified sign language interpreter prevented [the inmate] from understanding the charges against him or presenting his views," 857 F.2d at 565, and it remanded for determination of whether the Due Process Clause had thus been violated, *ibid.*

Case	Respondents' Assertions	United States' Response
Burchett v. *Bower*, 355 F. Supp. 1278 (D. Ariz. 1973)	• Court contemplated that inmate receiving psychiatric treatment in state mental hospital could have his treatment terminated and be returned to prison.	• Although the court found it unnecessary to address the constitutional right to treatment, it noted the uncontradicted testimony that the plaintiff was mentally ill and that no psychiatric treatment was available at the prison, 355 F. Supp. at 1281, and it enjoined defendants from transferring the inmate back to the prison without affording him due process, see *id.* at 1281-1283. The court also enjoined "any future unconstitutional application of the statute to Burchett," *id.* at 1282.
Cody v. *Hilliard*, 599 F. Supp. 1025 (D.S.D. 1984), aff'd in part and rev'd in part on other grounds, 830 F.2d 912 (8th Cir. 1987) (en banc) (appeal did not encompass portion of district court's order dealing with medical and psychiatric care), cert. denied, 485 U.S. 906 (1988)	• Challenge to general prison conditions. • Conflates universal deficiencies in medical or psychiatric care with disability-based discrimination. • Eighth Circuit later reversed court's holding that double-celling was unconstitutional. Court held that provisions for inmates' special dietary needs were adequate.	• See U.S. Reply Br. at 15-16. • Though also addressing other deficiencies in prison conditions, the court found that inmates with "serious psychiatric needs" were not being treated by qualified medical personnel; it concluded that mental health care was "an especially grave deficiency" at the prison. 599 F. Supp. at 1058-1059.

Case	Respondents' Assertions	United States' Response
Cortes-Quinones v. *Jiminez-Nettleship*, 842 F.2d 556 (1st Cir. 1988), cert. denied, 488 U.S. 823 (1988)	• Non-disabled inmates subjected to conditions like Goodman's. • District jail. • Schizophrenic prisoner was killed by other inmates, not by state officials. Prison was generally overcrowded. No claim of discrimination against decedent.	• See U.S. Reply Br. at 5-6, 15-16; *Lane*, 541 U.S. at 527-528 n.16. • Though the schizophrenic inmate died at the hands of fellow inmates, the court upheld a jury finding that, by transferring him to the overcrowded jail where he was killed and leaving him "unsegregated and without treatment for his psychological problems for nearly four months," Puerto Rico prison officials exhibited deliberate indifference to his health and safety. 842 F.2d at 559-560.
Cummings v. *Roberts*, 628 F.2d 1065 (8th Cir. 1980)	• Not decided on the merits. • County jail. • Inmate was not disabled when taken into custody, but suffered back injury while in detention.	• See U.S. Reply Br. at 5-6, 7-10; *Lane*, 541 U.S. at 527-528 n.16. • The court reversed summary judgment for the defendants not only on the inmate's claim of deliberate indifference to his medical needs, but also on his claim that prison officials' failure to give him a wheelchair made it necessary for him to crawl on the floor. 628 F.2d at 1068.
Delafose v. *Manson*, 385 F. Supp. 1115 (D. Conn. 1974)	• Claim at issue was more similar to Title I employment-discrimination claim: inmates hospitalized for physical ailments received "hospital pay" while inmates hospitalized for mental ailments did not.	• The court held that disparate treatment of the two groups amounted to irrational discrimination against mentally ill patients; the situation is not analogous to employment discrimination because members of neither group were working. 385 F. Supp. at 1116-1121.

Case	Respondents' Assertions	United States' Response
Doe v. *Coughlin*, 697 F. Supp. 1234 (N.D.N.Y. 1988)	• Not decided on the merits. • Court decided the case on privacy grounds and noted that the same challenge had been rejected when brought under the Fourteenth Amendment.	• See U.S. Reply Br. at 7-10. • Though observing that other constitutional challenges to similar plans had failed, the court was unequivocal that involuntary placement of an inmate in a dormitory designated for HIV-positive individuals—and thus involuntary disclosure of the inmate's HIV-positive status—violated his constitutional right to privacy, see 697 F. Supp. at 1236-1241, and that the prison program operated "in a constitutionally impermissible manner," *id.* at 1240. The court determined that "[t]here is no acceptable reason why a prisoner must have his constitutional rights violated particularly in an incomplete program." *Id.* at 1243.

Case	Respondents' Assertions	United States' Response
Duran v. *Anaya*, 642 F. Supp. 510 (D. N.M. 1986)	• Challenge to general prison conditions. • Not decided on the merits. • Conflates universal deficiencies in medical or psychiatric care with disability-based discrimination. • Preliminary injunction was to prevent certain staff reductions, not to cease continuing constitutional harm. Court addressed harms to the entire prison population, not just disabled inmates.	• See U.S. Reply Br. at 7-10, 15-16. • Though no harm had yet occurred, the court made clear that judicial intervention was necessary to ensure "maintenance of minimal constitutional standards" in the areas of physical and mental health, and that "the level of psychiatric care being provided at this time, particularly to prisoners in need of acute care, is unacceptable by any conceivable measure or standard." 642 F. Supp. at 526. The court noted that current programs "are deficient *even now* in a number of important respects," *ibid.* (emphasis added), and that the impact would be particularly severe for inmates with serious mental health problems, see *id.* at 516, 519.

Case	Respondents' Assertions	United States' Response
Eng v. *Smith*, 849 F.2d 80 (2d Cir. 1988)	• Not decided on the merits. • Conflates universal deficiencies in medical or psychiatric care with disability-based discrimination. • Court declined to resolve whether problems in prison's mental health system rose to the level of "deliberate indifference" to inmates' medical needs.	• See U.S. Reply Br. at 7-10, 15-16. • Though not deciding whether the "deliberate indifference" standard had been met, the court noted that the evidentiary record supported a finding of "systemic [constitutional] deficiencies" in the prison's mental health system, 849 F.2d at 82, and "deliberate indifference to serious medical needs, *ibid.*
Flakes v. *Percy*, 511 F. Supp. 1325 (W.D. Wis. 1981)	• Suit addressed conditions in a state hospital, not a prison.	• The hospital's population included convicted sex offenders in need of specialized treatment, as well as people convicted of crimes and transferred from prison. 511 F. Supp. at 1326. In addition, the hospital was in the process of conversion to a prison, and the state Division of Corrections shared responsibility for the facility. *Ibid.* The court noted that confinement in a mental institution is "closely analogous to existence in many prisons, and much more stern and dreary than existence in many medium and light security correctional institutions." *Id.* at 1333.

Case	Respondents' Assertions	United States' Response
Inmates of Occoquan v. *Barry*, 717 F. Supp. 854 (D.D.C. 1989)	• Challenge to general prison conditions. • Conflates universal deficiencies in medical or psychiatric care with disability-based discrimination. • Non-disabled inmates subjected to conditions like Goodman's. • Court found prison conditions unconstitutionally deficient in numerous respects, going far beyond treatment of disabled people.	• See U.S. Reply Br. at 15-16. • Among a long litany of deficiencies, the court found that, by housing seriously mentally ill inmates in a cell block where they were locked in their cells 23 hours a day and received little treatment, 717 F. Supp. at 863-864, prison officials exhibited "deliberate indifference to their psychiatric health needs," *id.* at 868.
Inmates of the Allegheny County Jail v. *Peirce*, 487 F. Supp. 638 (W.D. Pa. 1980)	• Conflates universal deficiencies in medical or psychiatric care with disability-based discrimination. • County jail.	• See U.S. Reply Br. at 5-6, 15-16; *Lane*, 541 U.S. at 527-528 n.16. • Court found that the "provision of care to mentally ill inmates * * * is inadequate to the extent of 'deliberate indifference,' " and listed numerous respects in which such care was "far below minimum standards." 487 F. Supp. at 643.

Case	Respondents' Assertions	United States' Response
James v. *Wallace*, 382 F. Supp. 1177 (M.D. Ala. 1974)	• Challenge to general prison conditions. • Conflates universal deficiencies in medical or psychiatric care with disability-based discrimination.	• See U.S. Reply Br. at 15-16. • The court refused to dismiss the plaintiffs' claims, specifically noting their allegations that members of the class were "incarcerated in institutions having inadequate facilities and programs designed to meet the treatment and custodial needs of those with mental or emotional difficulties or with geriatric problems." 382 F. Supp. at 1182.
Johnson v. *Hardin County*, 908 F.2d 1280 (6th Cir. 1990)	• County detention center. • Court held that county could not be liable because inmate had produced insufficient evidence of custom or policy of deliberate indifference to medical needs.	• See U.S. Reply Br. at 5-6; *Lane*, 541 U.S. at 527-528 n.16. • Though holding that the *county* was not liable, the court upheld the jury's finding that jail officials were liable for their deliberate indifference to the inmate's medical needs. 908 F.2d at 1284.

Case	Respondents' Assertions	United States' Response
Kendrick v. *Bland*, 541 F. Supp. 21 (W.D. Ky. 1981)	• Challenge to general prison conditions. • Inmates' suit encompassed a wide variety of prison conditions. Case demonstrates that existing remedies were adequate before ADA, because court required prison to correct certain deficiencies pursuant to Rehabilitation Act.	• See U.S. Reply Br. at 15-16; U.S. Opening Br. at 40-41 (existing laws inadequate); *Lane*, 541 U.S. at 526 & n.15. • The court specifically noted "acts of brutality and cruel and inhuman punishment" committed against inmates suffering from severe mental impairments, 541 F. Supp. at 25, attributing this to guards' lack of "adequate, or apparently any, training in dealing with mentally disturbed inmates," *ibid.* The Rehabilitation Act section of the consent decree addressed only "physical barriers to the handicapped." *Id.* at 40.
Knecht v. *Gilman*, 488 F.2d 1136 (8th Cir. 1973)	• Institution at issue was state hospital, not prison; population included people who had been civilly committed.	• Iowa Security Medical Facility, where inmates were held and received certain drugs involuntarily, included not only civilly committed but also mentally ill inmates from jails. 488 F.2d at 1138.

Case	Respondents' Assertions	United States' Response
Laaman v. *Helgemoe*, 437 F. Supp. 269 (D.N.H. 1977)	• Challenge to general prison conditions. • Conflates universal deficiencies in medical or psychiatric care with disability-based discrimination. • Case involved numerous deficiencies in prison conditions. Court's information about prevalence of mental illness came from national statistics.	• See U.S. Reply Br. at 15-16. • Though the court estimated the prevalence of mental illness in the prison based on national statistics, it explained that "[t]his is due at least in part to defendants' failure to adequately diagnose the plaintiff class so that no records exist," and the court also found that "the national statistics reflect the incidence of mental illness at NHSP." 437 F. Supp. at 276 n.1. The prison lacked sufficient personnel to address inmates' "serious mental health care needs." *Id.* at 324.
LaFaut v. *Smith*, 834 F.2d 389 (4th Cir. 1987)	• Federal prison.	• See *Lane*, 541 U.S. at 527-529 nn.16-17; *Hibbs*, 538 U.S. at 730-732 (relying on cases and legislative history concerning federal-government discrimination). • Eighth Amendment was violated when paraplegic inmate was placed in a cell with toilet facilities that he could use only by dragging himself across the floor. 834 F.2d at 392.

Case	Respondents' Assertions	United States' Response
Langley v. *Coughlin*, 715 F. Supp. 522 (S.D.N.Y. 1989)	• Not decided on the merits. • Conflates universal deficiencies in medical or psychiatric care with disability-based discrimination. • Only a subclass of plaintiffs complained of deficient medical care. Non-disabled inmates complained about being housed with inmates who arguably were disabled.	• See U.S. Reply Br. at 7-10, 15-16. • The court cited evidence of "repeated and systemic failures in the provision of health care services to inmates with very serious mental disorders," 715 F. Supp. at 540, "dramatic failures to meet even minimal professional standards in providing psychiatric services," *ibid.*, and testimony that certain mentally ill inmates may be severely impacted by their proximity to other mentally ill inmates, *ibid.* The court held that the evidence was "ample" to show that the inmates "were injured by a failure to treat [their] serious medical needs," that the "findings would suffice to justify a conclusion that plaintiffs' rights were violated," *id.* at 542, and that state officials were deliberately indifferent, *id.* at 540.
Leach v. *Shelby County Sheriff*, 891 F.2d 1241 (6th Cir. 1989), cert. denied, 495 U.S. 932 (1990)	• County jail.	• See U.S. Reply Br. at 5-6; *Lane*, 541 U.S. at 527-528 n.16. • Court found policy or custom of deliberate indifference to the needs of paraplegic prisoners, including the plaintiff, who was not bathed regularly and who was forced to sit in his own urine for long periods of time. 891 F.2d at 1243, 1248.

Case	Respondents' Assertions	United States' Response
Lee v. *McManus*, 543 F. Supp. 386 (D. Kan. 1982)	• Not decided on the merits.	• See U.S. Reply Br. at 7-10. • Preliminary injunction granted where paraplegic prisoner's catheter was not cleaned, and where he was forced to sit in bodily waste. 543 F. Supp. at 389-390. The court "wishe[d] to impress upon defendants its distress" at plaintiff's treatment and officials' passivity and complacency in the face of serious medical needs. *Id.* at 392.
Lightfoot v. *Walker*, 486 F. Supp. 504 (S.D. Ill. 1980)	• Challenge to general prison conditions. • Conflates universal deficiencies in medical or psychiatric care with disability-based discrimination. • Non-disabled inmates subjected to conditions like Goodman's.	• See U.S. Reply Br. at 15-16. • Though addressing the prison's overall health care system, the court noted that "epileptics, diabetics, asthmatics, hypertensives and [inmates with] cardiovascular problems, as well as psychiatrically disturbed inmates," were held in "control cells"; these cells were infrequently observed, such that a prisoner could become ill and die "within minutes," and conditions in the cells were "abysmal." 486 F. Supp. at 511. Court also noted that prison officials had "recklessly failed in their duties to design and implement a mental health care delivery system which is capable of providing minimally required levels of adequate mental health care." *Id.* at 525.

Case	Respondents' Assertions	United States' Response
Littlefield v. *Deland*, 641 F.2d 729 (10th Cir. 1981)	• County jail.	• See U.S. Reply Br. at 5-6; *Lane*, 541 U.S. at 527-528 n.16. • Finding constitutional inadequacies in the treatment of mentally ill prisoners. 641 F.2d at 732.
Lynch v. *Baxley*, 744 F.2d 1452 (11th Cir. 1984)	• County jails. • This case is not relevant because it was brought by mentally ill individuals incarcerated in county jails while awaiting civil commitment proceedings, but who were not in jail for punishment.	• See U.S. Reply Br. at 5-6; *Lane*, 541 U.S. at 527-528 n.16. • While the gravamen of plaintiffs' complaint was the fact of their confinement awaiting involuntary civil commitment, the fact remains that this case found unconstitutional treatment in a *prison* setting by *prison* officials, which is an aspect of *prison* administration that Title II addresses. The case cited evidence that mentally ill individuals were kept in unconstitutional conditions. See 744 F.2d at 1460-1461 (prisons were plagued by overcrowding, safety hazards, lack of medical and mental health professionals, and without recreational facilities). Moreover, this case noted that the mentally ill have special requirements that were not met in Alabama prisons. *Id.* at 1458 (citing expert testimony showing that "jail is particularly harmful to those who are mentally ill."). Those unconstitutional conditions would affect all mentally ill prisoners, not just those awaiting civil commitment proceedings.

Case	Respondents' Assertions	United States' Response
Mackey v. *Procunier*, 477 F.2d 877 (9th Cir. 1973)	• Not decided on the merits.	• See U.S. Reply Br. at 7-10. • The evidence in this case "raise[d] serious constitutional questions respecting cruel and unusual punishment or impermissible tinkering with the mental processes" of a mentally ill prisoner. 477 F.2d at 878.
Maclin v. *Freake*, 650 F.2d 885 (7th Cir. 1981)	• Not decided on the merits.	• See U.S. Reply Br. at 7-10. • Paraplegic inmate established a genuine issue of material fact that he was denied access to physical therapy and that prison officials exhibited "deliberate indifference to [his] serious medical needs" that could violate the Eighth Amendment. 650 F.2d at 889.
Mandel v. *Doe*, 888 F.2d 783 (11th Cir. 1989)	• County jail. • Prisoner was injured when jumped off the bed of a work-detail pick-up truck.	• See U.S. Reply Br. at 5-6; *Lane*, 541 U.S. at 527-528 n.16. • The fact that the inmate's disability was created while he was incarcerated does not diminish (and indeed may enhance) his claim that prison officials were deliberately indifferent to his disability. The evidence presented was that the failure to x-ray and perform surgery on the inmate's leg caused permanent physical impairment. 888 F.2d at 789-790. The Eleventh Circuit found the record "replete with evidence of serious medical need, grossly deficient treatment and callous indifference." *Id.* at 787.

Case	Respondents' Assertions	United States' Response
Maynard v. *New Jersey*, 719 F. Supp. 292 (D.N.J. 1989)	• Dismissed case against State on Eleventh Amendment grounds, but denied motion to dismiss as to prison medical personnel.	• Sufficient evidence of constitutional violations to permit suit against state officials by the parents of a deceased state inmate who alleged that prison officials were deliberately indifferent in failing to diagnose and treat inmate's AIDS, instead offering him only throat lozenges and Tylenol and failing to investigate the cause of his collapse. 717 F. Supp. at 293-294, 296.
Miranda v. *Munoz*, 770 F.2d 255 (1st Cir. 1985)	• District jail.	• See U.S. Reply Br. at 5-6; *Lane*, 541 U.S. at 527-528 n.16. • Court of appeals reversed grant of a directed verdict to four "supervisory officials in the Puerto Rico correctional system," noting that evidence showed that the deep failings in medical treatment "were as much a matter of central administration policy as of local reaction," such that a reasonable factfinder could hold them responsible. 770 F.2d at 257, 261-262.

Case	Respondents' Assertions	United States' Response
Mitchell v. *Untreiner*, 421 F. Supp. 886 (N.D. Fla. 1976)	• Challenge to general prison conditions. • Conflates universal deficiencies in medical or psychiatric care with disability-based discrimination. • Non-disabled inmates subjected to conditions like Goodman's. • County jail.	• See U.S. Reply Br. at 5-6, 15-16; *Lane*, 541 U.S. at 527-528 n.16. • Evidence showed that mentally ill and disabled inmates were subjected to particularly distressing treatment. See 421 F. Supp. at 890 ("The Jail is entirely without medical, nursing, psychological, or dental staff on the premises. Jail personnel with only some first aid training arbitrarily decide whether inmates need medical treatment."); *id.* at 891 ("As many as four or five mentally disturbed inmates at a time are crowded into 'Z' cell. There is no shower in 'Z' cell. Violently ill inmates are likewise crowded into 'Z' cell with other mentally disturbed inmates.").
Mullen v. *Smith*, 738 F.2d 317 (8th Cir. 1984)	• Federal prison.	• See *Lane*, 541 U.S. at 527-529 nn.16-17; *Hibbs*, 538 U.S. at 730, 732.

Case	Respondents' Assertions	United States' Response
Negron v. *Preiser*, 382 F. Supp. 535 (S.D.N.Y. 1974)	• Not decided on the merits. • Court entered injunction to require record-keeping, but refused to find Eighth Amendment violation on current record.	• See U.S. Reply Br. at 7-10. • The court found sufficient evidence of mistreatment of mentally ill inmates in isolation cells, see 382 F. Supp. at 540-541, to issue an injunction to monitor and document the conditions of confinement, *id.* at 542-543 ("Plaintiffs have demonstrated very serious questions going to the merits of this case, and the probability of serious and irreparable harm during the pendency of this litigation.").
Negron v. *Ward*, 458 F. Supp. 748 (S.D.N.Y. 1978)	• Challenge to general prison conditions. • Not decided on the merits. • Due process violation, rather than discrimination on basis of mental illness.	• See U.S. Reply Br. at 7-10, 15-16; *Lane*, 541 U.S. at 522-523. • Court found widespread violations of the due process rights of mentally ill inmates by withholding psychiatric treatment as a form of punishment. 458 F. Supp. at 760-761. The evidence was so strong that good faith immunity was denied. *Id.* at 761-764.

Case	Respondents' Assertions	United States' Response
Nelson v. *Collins*, 455 F. Supp. 727 (D.M.D. 1978), aff'd and remanded sub nom. *Johnson* v. *Levine*, 588 F.2d 1378 (4th Cir. 1978) (remanding only for judicial approval of State's plan to alleviate prison conditions)	• Challenge to general prison conditions. • Conflates universal deficiencies in medical or psychiatric care with disability-based discrimination. • Non-disabled inmates subjected to conditions like Goodman's.	• See U.S. Reply Br. at 15-16. • The court found Eighth Amendment violations in use of isolation cells, and that some "inmates whose bizarre behavior is the result of mental illness are confined in the isolation area without adequate medical treatment." 455 F. Supp. at 735. Prison ordered to adopt a procedure "by which prompt and adequate medical review and care" is provided, including "psychiatric assistance." *Id.* at 735.

Case	Respondents' Assertions	United States' Response
Newman v. *Alabama*, 349 F. Supp. 278 (M.D. Ala. 1972), aff'd in part, 503 F.2d 1320 (5th Cir. 1974), cert. denied, 421 U.S. 948 (1975)	• Challenge to general prison conditions. • Conflates universal deficiencies in medical or psychiatric care with disability-based discrimination.	• See U.S. Reply Br. at 15-16. • The court stated that "[t]he fate of those many prisoners who are mentally ill or retarded deserves special mention," 349 F. Supp. at 284, and that "[m]ental illness and mental retardation are the most prevalent medical problems in the Alabama prison system, *ibid.* The court found that "the large majority of mentally disturbed inmates receive no treatment whatsoever," and further cited both statistics and specific instances of mistreatment of mentally ill inmates. *Id.* at 284-285. The court also found unconstitutional treatment of physically disabled patients, including wounds that became infested with maggots. *Ibid.* This led the court to conclude that "[i]t is tautological that such care is constitutionally inadequate." *Id.* at 284.
Palmigiano v. *Garrahy*, 443 F. Supp. 956 (D.R.I. 1977)	• Challenge to general prison conditions. • Conflates universal deficiencies in medical or psychiatric care with disability-based discrimination. • Non-disabled inmates subjected to conditions like Goodman's.	• See U.S. Reply Br. at 15-16. • In addition to general prison conditions, the court specifically noted that the "grossly inadequate system of medical care, including psychiatric care, afforded inmates is part of the intolerable totality of conditions" that violates the Eighth Amendment. 433 F. Supp. at 983.

Case	Respondents' Assertions	United States' Response
Parrish v. *Johnson*, 800 F.2d 600 (6th Cir. 1986)	• Court declined to consider Fourteenth Amendment claim because "the Fourteenth Amendment provides a prisoner with no greater protection than the Eighth Amendment."	• The court determined that the state prison guard violated the Eighth Amendment by engaging in a long series of "deviant acts," including "[c]ausing a prisoner to sit in his own feces, assaulting a prisoner with a knife, extorting food from a prisoner, verbally abusing a prisoner," and failing to provide him with medical care, all of which was "exacerbated by [the prisoner's] paraplegic condition." 800 F.2d at 605. The court declined to consider prisoner's *substantive* due process Fourteenth Amendment claim, finding such rights co-extensive with the Eighth Amendment. 800 F.2d at 604 n.5.
Ramos v. *Lamm*, 639 F.2d 559 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981)	• Challenge to general prison conditions. • Conflates universal deficiencies in medical or psychiatric care with disability-based discrimination. • Non-disabled inmates subjected to conditions like Goodman's.	• See U.S. Reply Br. at 15-16. • In addition to problems in the general condition of the prison and availability of medical care, the court cited expert evidence that 5%-10% of the inmates were "seriously mentally ill," another 10%-25% "need treatment although they are not seriously ill," and "[t]he lack of adequate mental health services * * * contributes to inmate suffering and at times causes suicide and self-mutilation by inmates" sufficient to constitute an Eighth Amendment violation. 639 F.2d at 577-578.

Case	Respondents' Assertions	United States' Response
Ruiz v. *Estelle*, 503 F. Supp. 1265 (S.D. Tex. 1980), aff'd in part and rev'd in part, 679 F.2d 1115 (5th Cir. 1982) (reversing as to the scope of the district court's remedy, but not as to its finding of constitutionally' deficient medical and psychiatric care), cert. denied, 460 U.S. 1042 (1983)	• Challenge to general prison conditions. • Non-disabled inmates subjected to conditions like Goodman's.	• See U.S. Reply Br. at 15-16. • The court cited evidence that 10%-15% of the prison population was mentally retarded and that the failure to protect mentally retarded inmates from abuse and physical harm, as well as the prisoners' inability to understand and participate in prison disciplinary proceedings, violated the Eighth Amendment. 503 F. Supp. at 1346. Moreover, the court determined that the Texas Department of Corrections specifically violated the Eighth Amendment rights of physically disabled prisoners by limiting access to wheelchairs, hearing aids, and other assistive devices, and by refusing wheelchair accessible cells, toilets, and shower facilities. *Id.* at 1340-1343 & nn.153-162. Paraplegic inmate was denied parole for failure to participate in inaccessible work programs. *Id.* at 1341 n.157.
Sites v. *McKenzie*, 423 F. Supp. 1190 (N.D. W. Va. 1976)	• Mentally disabled inmates were seeking treatment equal to that of civilly committed mentally ill, or same treatment as similarly disabled non-prisoners.	• Besides the plaintiff's equal protection claim based on differential treatment of inmates who were civilly committed versus " 'criminally' insane," the court separately found that the state regulation which precluded prisoners in mental institutions from parole eligibility denied them equal protection of the law and was "clear[ly] unconstitutional." 423 F. Supp. at 1194-1195.

Case	Respondents' Assertions	United States' Response
Sykes v. *Kreiger*, 451 F. Supp. 421 (N.D. Ohio 1975)	• Challenge to general prison conditions. • Non-disabled inmates subjected to conditions like Goodman's. • County jail.	• See U.S. Reply Br. at 5-6, 15-16; *Lane*, 541 U.S. at 527-528 n.16. • The court stated that, in addition to concerns regarding the general prison population, "[o]f equal importance and immediate concern to the Court is the plight of psychiatric inmates detained at Cuyahoga County Jail." 451 F. Supp. at 425. The court found the jail had "a crisis evolving from the detention of inmates with advanced mental and emotional disorders" due to the lack of appropriate facilities, psychiatric care, procedures, and personnel. *Ibid.*
Talley v. *Stephens*, 247 F. Supp. 683 (E.D. Ark. 1965)	• Not a claim for disability discrimination, and court only noted that two plaintiffs were forced to perform labor with serious physical handicaps.	• *Lane*, 541 U.S. at 522-523. • The court found that injunctive relief was warranted on behalf of two inmates with "serious physical handicaps" who were required to do work beyond their physical capabilities, 247 F. Supp. at 687, and court "ha[d] no difficulty" finding Eighth Amendment violations, *ibid.* Court also found a lack of needed medical assistance. *Ibid.*

Case	Respondents' Assertions	United States' Response
Thompson v. *City of Portland*, 620 F. Supp. 482 (D. Me. 1985)	• County jail. • Complaint stemmed from events surrounding his arrest, and the court noted that plaintiff was not incarcerated so that the Eighth Amendment did not apply.	• See U.S. Reply Br. at 5-6; *Lane*, 541 U.S. at 527-528 n.16. • Plaintiff was locked up in a jail cell even after officers learned that "he really is a blind diabetic," and thus no reasonable basis for detention existed. 620 F. Supp. at 485. Case also demonstrates a critical lack of training and attention on the part of law enforcement officers to medical needs. *Id.* at 488 (holding that the State's conduct shocked the conscience, constituting a violation of plaintiff's substantive due process rights).
Tillery v. *Owenens*, 719 F. Supp. 1256 (W.D. Pa. 1989), aff'd, 907 F.2d 418 (3rd Cir. 1990)	• Challenge to general prison conditions. • Non-disabled inmates subjected to conditions like Goodman's.	• See U.S. Reply Br. at 15-16; *Lane*, 541 U.S. at 527-528 n.16. • Court specifically discussed at length the inadequacy of psychiatric care for mentally ill prisoners, and found that it violated the Eighth Amendment, 719 F. Supp. at 1284-1290, 1302-1306; and that acutely ill psychiatric patients are kept in "medieval conditions" in cells infested with roaches, *id.* at 1288, and "neither the cells nor the inmates are kept clean," *id.* at 1289. Court found serious failures and deliberate indifference in medical care afforded inmates with epilepsy, diabetes, and AIDS, *id.* at 1299-1301, 1305.

Case	Respondents' Assertions	United States' Response
Vitek v. *Jones*, 445 U.S. 480 (1980)	• No claim that prisoners were being involuntarily transferred to mental hospital because of intentional, irrational discrimination.	• *Lane*, 541 U.S. at 522-523. • *Vitek* demonstrates that, besides equal protection concerns, due process considerations are implicated when mentally ill prisoners are transferred or when other changes in the conditions of confinement are made. 445 U.S. at 493-94.
Waldrop v. *Evans*, 681 F. Supp. 840 (M.D. Ga. 1988), aff'd, 871 F.2d 1030 (11th Cir. 1989)	• Court granted summary judgment to nine of the defendants, including high ranking prison administrators, in part, finding that the prison was adequately staffed with medical professionals.	• The court found that the record permitted a reasonable factfinder to conclude that two state officials were deliberately indifferent to plaintiff's serious mental illness. 681 F. Supp. at 853-855.

Case	Respondents' Assertions	United States' Response
Wellman v. *Faulkner*, 715 F.2d 269 (7th Cir. 1983), cert. denied, 468 U.S. 1217 (1984)	• Challenge to general prison conditions. • Conflates universal deficiencies in medical or psychiatric care with disability-based discrimination. • Non-disabled inmates subjected to conditions like Goodman's.	• See U.S. Reply Br. at 15-16 • In addition to general concerns about the quality and availability of medical care, the court specifically found that the State had not "adequately staffed the psychiatric care component of Michigan City's medical care system," and that there had been no staff psychiatrist for over two years. Defendants' medical expert saw this as "[t]he most obvious serious deficiency in health care at Indiana State Prison" because, "without an on-site psychiatrist there is no one qualified to evaluate and treat psychiatric emergencies such as suicide and homicide candidates, or to follow patients who need to be maintained on long term psychotropic medications." 715 F.2d at 272. Court also found deliberate indifference in provision of colostomy bags. *Id.* at 274.

Case	Respondents' Assertions	United States' Response
Williams v. *Edwards*, 547 F.2d 1206 (5th Cir. 1977)	• Challenge to general prison conditions. • Conflates universal deficiencies in medical or psychiatric care with disability-based discrimination. • Non-disabled inmates subjected to conditions like Goodman's.	• See U.S. Reply Br. at 15-16. • The parties stipulated that there was "no psychiatric unit, although '[a]pproximately 40% of the inmate population, or 1,360 inmates, would benefit from psychiatric treatment.' An area of the cell block is used to house those for whom in-patient psychiatric care would be appropriate. Those confined to the cell block are under supervision of correctional officers who have no medical training. 'No notes, medical records or observations of the inmates confined to the psychiatric unit are recorded.' The parties conclude this stipulation saying 'The psychiatric unit is totally inappropriate for the confinement of a psychiatric patient.'" 547 F.2d at 1217-1218. Court therefore affirmed district court holding of constitutional violations. *Id.* at 1218.

Case	Respondents' Assertions	United States' Response
Yarbaugh v. *Roach*, 736 F. Supp. 318 (D.D.C. 1990)	• Not decided on the merits. • District of Columbia jail.	• See U.S. Reply Br. at 7-10; *Lane*, 541 U.S. at 527-528 n.16. • District Court found that the prisoner had not had a bath or shower in nine months and received no assistance in changing positions in bed. It therefore determined that "it is clear to the Court that plaintiff is not receiving adequate medical services" for treatment of multiple sclerosis. 736 F. Supp. at 320.
Young v. *Harris*, 509 F. Supp. 1111 (S.D.N.Y. 1981)	• Not decided on the merits.	• See U.S. Reply Br. at 15-16. • Court found an adequate basis for a reasonable factfinder to conclude that the State had violated prisoner's Eighth Amendment rights by failing for over sixteen months to provide him with a leg brace necessary for him to walk. 509 F. Supp. at 1113-1114.

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In The

Supreme Court of the United States

TONY GOODMAN,

Petitioner

v.

STATE OF GEORGIA, *et al.*

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR PETITIONER GOODMAN

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REPLY BRIEF FOR PETITIONER GOODMAN*

The proper result in this case follows straightforwardly from *Tennessee v. Lane*, 541 U.S. 509 (2004). Like the access-to-courts context addressed in *Lane*, the prison context is one in which provisions of the Constitution other than the Equal Protection Clause impose "affirmative obligations," *id.* at 532 – including the obligation to provide accommodations – on States in their treatment of individuals with disabilities. As shown in our opening brief, this Court has repeatedly held that the State's total control over daily human needs of inmates imposes on the State correlative affirmative duties under the Eighth Amendment and other constitutional provisions. Even more than in the access-to-courts context, the prison context is one in which there is a longstanding and continuing record of state violations of the constitutional rights of individuals with disabilities. Also more significantly than in *Lane*, the ADA requirement of "reasonable" modifications, 42 U.S.C. § 12131(2), takes account of the unique exigencies of the prison setting, and the limitations on inmate suits under legislation such as the Prison Litigation Reform Act (PLRA) further protects state prerogatives.

In their effort to justify invalidating Title II of the ADA in the prison context, respondents attempt to revive a number of arguments that this Court rejected two Terms ago in *Lane*. Only by ignoring the rationale and holding of *Lane*, and disregarding and distorting the legislative and judicial record here which exceeds that found sufficient in *Lane* and earlier cases, can respondents contend that the ADA exceeds Congress's prophylactic power under Section 5 of the Fourteenth Amendment to deter unconstitutional state treatment of inmates with disabilities.

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* On October 11, 2005, Justice Kennedy granted a motion for the instant brief to exceed by 10 pages the otherwise applicable limit of 20 pages under Rule 33.1(g)(vii) to reply to respondents' 71-page substantive appendix filed along with their brief.

The fatal flaws in respondents' arguments under this Court's precedent are particularly evident in light of the record in this case. This record involves claims by an inmate, who respondents describe as a "paraplegic," Resp. Br. 2, who alleges he was confined to a cell too small for a wheelchair to turn around, with inaccessible sanitary facilities. Respondents concede that the allegations underlying those claims, if supported at trial, would make out a violation of the Eighth Amendment. Resp. Br. 18.[1] Because of the long history of state violations of the constitutional rights of inmates with disabilities, and the carefully calibrated nature of the congressional response, Title II of the ADA is proper enforcement legislation insofar as it applies to the entire "class of cases," *Lane*, 541 U.S. at 531, brought by inmates with disabilities. But even if this Court were to conclude that Title II is not constitutional when considered for that class of cases, the statute would clearly be valid remedial legislation on the record here, where the very acts alleged to violate the statute also would violate the plaintiff's constitutional rights. *See City of Boerne v. Flores*, 521 U.S. 507, 518 (1997).

I. TITLE II OF THE ADA IS REASONABLE PROPHYLACTIC LEGISLATION TO ADDRESS PERVASIVE CONSTITUTIONAL VIOLATIONS AGAINST INMATES WITH DISABILITIES

A. Respondents Are Wrong That Only Rational-Basis Review Governs Here

1. Respondents argue (at 10-19) that this case is just like *Board of Trustees v. Garrett*, 531 U.S. 356 (2001), because disability-based discrimination is subject to only rational basis scrutiny under the Equal Protection Clause, and many inmate claims are subject to the "reasonably

[1] Respondents repeatedly refer to claims seeking "access to public services, programs, and activities," *e.g.*, Resp. Br. 19, but their arguments ignore Goodman's central claims, which involve sanitation, mobility, and protection from physical injury.

related to legitimate penological interests" test of *Turner v. Safley*, 482 U.S. 78, 89 (1987). Respondents are incorrect. This case involves constitutional rights that impose more searching scrutiny on States than the rational basis test.

Garrett involved claims for reasonable accommodation in state employment. That context involves no fundamental rights, and is subject to scrutiny only under the Equal Protection Clause – and only under deferential rational-basis review at that. Accordingly, the Constitution imposes no obligation on a State to accommodate individuals with disabilities in employment; "[i]f special accommodations for the disabled are to be required, they have to come from positive law." *Garrett*, 531 U.S. at 368.

In *Lane*, by contrast, this Court upheld application of the ADA to "cases implicating the accessibility of judicial services," 541 U.S. at 531, because in that context the statute enforces not just the Equal Protection Clause's prohibition of irrational intentional discrimination but also "a variety of other basic constitutional guarantees," *id.* at 522. Those constitutional guarantees, such as the due process guarantee of a meaningful opportunity to be heard in a court proceeding, imposed "a number of affirmative obligations" on States – including the obligation to accommodate individuals with disabilities in connection with courthouses and judicial proceedings. *Id.* at 532-533.

As we showed in our opening brief (at 14-18), this is a case like *Lane*, and unlike *Garrett*, where the Constitution imposes affirmative obligations of accommodation on States. Because inmates are totally "dependent on the government's permission and accommodation" to satisfy their daily human needs, *Cutter v. Wilkinson*, 125 S. Ct. 2113, 2121-2122 (2005), the Constitution imposes on States affirmative duties in the prison context. Failure to accommodate inmates' disabilities in some circumstances can constitute (and has frequently been held to constitute) "deliberate indifference to serious medical needs," *Estelle v. Gamble*, 429 U.S. 97, 104 (1976), or "deliberate indifference to inmate health and safety," *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (internal quotation marks omitted),

that violates the Eighth Amendment. It can also constitute a denial of procedural due process or a violation of the First Amendment. *See* Goodman Br. 16-17, 18.

These affirmative state obligations reflect "basic constitutional guarantees, infringements of which are subject to more searching judicial review" than that imposed by the rational basis test. *Lane*, 541 U.S. at 522-523. When only the rational basis test applies, accommodation is virtually never required. A State "could quite hardheadedly – and perhaps hardheartedly" – refuse to provide an accommodation to its employees because of the incremental cost or burden attached to it. *Garrett*, 531 U.S. at 367-368; *see also Lane*, 541 U.S. at 547 (Rehnquist, C.J., dissenting) ("financial considerations almost always furnish a rational basis for a State to decline to make those alterations"). But a State cannot deny a wheelchair or accessible toilet to an inmate with a disability on the ground that those accommodations would cost some money, any more than it could deny an inmate needed medical care on that ground. *Cf. Estelle*, 429 U.S. at 103. Such a denial of accommodation, although "rational" for equal protection purposes, would nonetheless constitute cruel and unusual punishment. *See LaFaut v. Smith*, 834 F.2d 389, 394 (4th Cir. 1987) (Powell, J., sitting by designation).

Respondents' *amici* believe it critical that Eighth Amendment claims are not subjected to "the kind of strict scrutiny that applies to claims of race discrimination." Tenn. Br. 11. But even in the race context, the Equal Protection Clause imposes no duty to provide accommodations. In that respect, which is the relevant respect for this case, the Eighth Amendment's prohibition against Cruel and Unusual Punishments imposes on States even more extensive obligations than those imposed by the Equal Protection Clause itself.

And violations of the Eighth Amendment are in another important respect easier to demonstrate than even race-based violations of the Equal Protection Clause.

The Equal Protection Clause requires a showing of intentional discrimination on the part of the State. *See Washington v. Davis*, 426 U.S. 229, 239-248 (1976). This Court has interpreted that requirement as demanding more than simply "intent as awareness of consequences," but instead that the decisionmaker "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *McCleskey v. Kemp*, 481 U.S. 279, 298 (1987) (internal quotation marks omitted; quoting *Personnel Admin. of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)). By contrast, the Eighth Amendment generally requires a showing only of "deliberate indifference" to a health, safety, or medical need, or another need the denial of which would constitute cruel and unusual punishment. This Court has interpreted that requirement as incorporating a subjective recklessness standard, *see Farmer*, 511 U.S. at 838-840, which asks whether the State had "knowledge of a significant risk of harm," *id.* at 837.[2]

Respondents' invocation of *Turner*, *supra*, is thus inapposite. Claims under the Eighth Amendment and the procedural component of the Due Process Clause are not governed by the deferential *Turner* test. But even under that test, States are required to provide accommodations to inmates with disabilities in some circumstances. *See* Goodman Br. 17-18.

Respondents and their *amici* barely advert to these affirmative obligations imposed on States in the prison context. Nowhere do they deny that the Constitution imposes a duty to provide reasonable accommodation to inmates with disabilities in many circumstances – including those that involve basic sanitary, mobility, and medical

[2] The same point holds even more true for violations of the procedural component of the Due Process Clause. That Clause requires that the "deprivation" of life, liberty, or property be more than merely negligent, *see Daniels v. Williams*, 424 U.S. 327, 330-331 (1986), but no particular state of mind is needed to establish a denial of the constitutionally required process that must attend the deprivation.

needs. There is simply no legitimate penological interest in providing an environment that imposes harsher conditions on inmates with disabilities than upon all other inmates.

2. Respondents contend (at 28) that Title II of the ADA cannot be understood to enforce the Cruel and Unusual Punishments Clause, because that Clause "is not primarily an anti-discrimination command, nor is it aimed just at the class of prisoners with disabilities." That argument ignores the overlap between the ADA's restrictive disability definition and the class of people with "serious medical needs" that require accommodation under this Court's Eighth Amendment jurisprudence. *Estelle*, 429 U.S. at 104; *see* Goodman Br. 39.

More fundamentally, respondents' argument that the ADA enforces only "anti-discrimination command[s]" cannot be squared with *Lane*. The various constitutional components of the "right of access to the courts" at issue in *Lane*, 521 U.S. at 523, were not primarily anti-discrimination commands, nor were they targeted at individuals with disabilities. *See ibid.* (relying, *inter alia*, on the due process and Sixth Amendment rights of criminal defendants to be present at their trials, the due process right of a "meaningful opportunity to be heard" in civil proceedings, and the First Amendment right of access to criminal proceedings by members of the public).

In holding that Title II validly enforces general constitutional rights that do not focus on discrimination, *Lane* recognized a point the Court previously had emphasized, that "Congress had a more comprehensive view of the concept of discrimination advanced in the ADA" than the concept underlying the Equal Protection Clause. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 598 (1999); *see also Lane*, 541 U.S. at 537 (Ginsburg, J., concurring). Title II's general prohibition against discrimination includes a requirement that States make "reasonable modifications" to their "rules, policies, or practices" where those modifications are essential to ensure that people

with disabilities enjoy the same rights to which others are entitled. 42 U.S.C. § 12131(2); 28 C.F.R. § 35.130(b)(7).

When a State fails to extend a requested accommodation to an inmate with a disability – such as accessible sanitary facilities, appropriate medical treatment, or housing decisions that avoid likely harm to the inmate – and that failure rises to the level of deliberate indifference to the health or safety of the inmate, the Eighth Amendment's requirements overlap with those of the ADA. The statute thus plainly enforces the Eighth Amendment in the prison context – even in cases where there is no discrimination in violation of the Equal Protection Clause.

B. The Record Of State Violations Of The Constitutional Rights Of Inmates With Disabilities Is Extensive And The Court Should Reject Respondents' Attempt To Rewrite That Record

In their brief and their 71-page appendix, respondents attempt to divide up the evidence supporting Title II's constitutionality into a series of discrete categories and then assert that virtually none of those categories is relevant to the constitutionality of the statute. To the contrary, for the reasons explained below, that evidence is directly relevant.

The Court should not lose sight of the overall picture when sorting through respondents' various objections. No matter how the evidence is sliced, this case involves a legislative and judicial record of constitutional violations that is far more extensive than the record in any of this Court's *Boerne* cases, including *Lane*.

1. The Record of Constitutional Violations Here is Far Greater Than That in *Lane* or *Hibbs*

"In identifying past evils, Congress obviously may avail itself of information from any probative source."

South Carolina v. Katzenbach, 383 U.S. 301, 330 (1966). State violations of the constitutional rights of inmates with disabilities have been extensively documented in a number of fora, including: (1) congressional hearings dating back to 1969, as well as the hearings of a congressionally-appointed task force considering the ADA; (2) studies and government reports from the mid-1970s until the present day; and (3) dozens of reported judicial decisions. *See* Goodman Br. 20-36. Our opening brief cites 73 judicial decisions in cases implicating constitutional rights in this context, 28 of which found that the constitutional rights of inmates with disabilities had been violated. Goodman Br. 27-36 & nn.14-26. That is "confirming judicial documentation," *Garrett*, 531 U.S. at 376 (Kennedy, J., concurring), that has not been present in any case under the Reconstruction Amendments to come before this Court since at least *City of Rome v. United States*, 446 U.S. 156 (1980) (upholding 1975 extension of the Voting Rights Act).

In neither *Lane* nor *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003) – the two cases in which this Court has upheld statutes against *Boerne*-based challenges – was the underlying record of constitutional violations as strong as it is here. In *Lane*, the evidence that States had unconstitutionally denied individuals with disabilities access to the courts consisted of a government report that spoke generally about inaccessible government buildings but did not refer to courts specifically, *Lane*, 541 U.S. at 527; three pages of testimony in a committee hearing on the ADA, *ibid.*; testimony before the congressionally-appointed task force, *ibid.*; and nine reported cases – two of which found constitutional violations, and two of which (a different two) involved physical access to courtrooms, *id.* at 525 n.14.

In *Hibbs*, the Court pointed to hearing testimony and other evidence (mostly discussing the private sector) that employers' paternity leave policies were less generous (on the books and in practice) than pregnancy and maternity leave policies. *Hibbs*, 538 U.S. at 730-732. But there was no evidence that any court had found those practices

unconstitutional – a finding that would have been difficult to make in light of this Court's decision in *Geduldig v. Aiello*, 417 U.S. 484 (1974). *See Hibbs*, 538 U.S. at 749-753 (Kennedy, J., dissenting). The record of constitutional violations here is far stronger than those that the Court found sufficient to justify prophylactic legislation in *Lane* and *Hibbs*.

2. The Record of Constitutional Violations Justifies Nationwide Prophylactic Legislation

Respondents' *amici* assert that Title II cannot be upheld in the prison context unless courts had found multiple violations of disabled inmates' constitutional rights in each of the 50 States. Tenn. Br. 16-18, 26-28. But this Court has never held that even a *single* judicial finding of unconstitutionality is required before Congress may enact legislation pursuant to its authority under Section 5 of the Fourteenth Amendment. To the contrary, *Lane* and *Hibbs* upheld nationwide prophylactic legislation on the basis of records that included two (*Lane*) or no (*Hibbs*) prior judicial findings of constitutional violations. *See also Oregon v. Mitchell*, 400 U.S. 112, 118 (1970) (unanimously upholding nationwide federal statutory ban on literacy tests); *id.* at 216 (Harlan, J., concurring in part and dissenting in part) ("Despite the lack of evidence of specific instances of discriminatory application or effect, Congress could have determined that racial prejudice is prevalent throughout the Nation, and that literacy tests unduly lend themselves to discriminatory application, either conscious or unconscious."); *id.* at 284 (Stewart, J., concurring in part and dissenting in part) ("Because the justification for extending the ban on literacy tests to the entire Nation need not turn on whether literacy tests unfairly discriminate against Negroes in every State in the Union, Congress was not required to make state-by-state findings concerning either the equality of educational opportunity or actual impact of literacy requirements on the Negro citizen's access to the ballot box.")

The record of violations of the constitutional rights of disabled inmates, which touches at least 37 States, *see* Goodman Br. 20-36, is a far more powerful nationwide record than was present in *Lane* and *Hibbs*. Moreover, by taking the accountant-like approach of simply counting the number of cases finding constitutional violations and dividing that number by an estimate of the total population of inmates with disabilities, Tenn. Br. 17, App., respondents' *amici* present a distorted picture of the record. *Amici* count each judicial decision as a single violation, even though a number of the decisions we cite found violations of the rights of inmates with disabilities throughout an entire prison system. *See, e.g.*, *Ruiz v. Estelle*, 503 F. Supp. 1265, 1340-1345 (S.D. Tex. 1980) (finding an array of violations of the constitutional rights of inmates with a variety of disabilities across the Texas prison system), *aff'd in relevant part*, 679 F.2d 1115 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983); *Newman v. Alabama*, 349 F. Supp. 278, 284 (M.D. Ala. 1972) (finding violations of the constitutional rights of inmates with mental retardation and mental illness across the Alabama prison system), *aff'd in relevant part*, 503 F.2d 1320 (5th Cir. 1974), *cert. denied*, 421 U.S. 948 (1975). And *amici* count as disabled fully a third of all inmates. In so doing, they rely on a definition of disability ("some physical impairment or mental condition") that is far broader than the definition that appears in the ADA. *See* 42 U.S.C. § 12102(2)(A) (requiring not just a "physical or mental impairment," but one that "substantially limits" a "major life activit[y]"); *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 197 (2002) (stating that "these terms need to be interpreted strictly to create a demanding standard for qualifying as disabled").

In comparison to the records in *Lane* and *Hibbs*, the record of constitutional violations here has been documented far more extensively by both Congress and the courts. Whatever one may think of the records in those cases, the charge that States have repeatedly violated the

constitutional rights of inmates with disabilities is, sadly, supported by much "more than conjecture." *Hibbs*, 538 U.S. at 748 (Kennedy, J., dissenting).

3. Respondents Ignore *Lane* by Asking this Court to Disregard the Extensive Record of Constitutional Violations That Continued After the ADA's Enactment

Respondents attempt to distract attention from this record by asserting that the Court should not consider entire categories of probative evidence of state violations of the constitutional rights of inmates with disabilities. First, respondents state that evidence developed after Congress enacted the ADA is not relevant. Resp. Br. 20-21, 27, 30-31. Thus, they urge this Court to disregard any judicial decisions or studies announced after the enactment of the ADA that find that States were unconstitutionally treating inmates with disabilities.

Even if respondents were correct on this point, the evidence supporting the constitutionality of Title II in the prison context – including, by respondents' own count, 54 reported judicial decisions during the pre-ADA period – would far exceed the evidence this Court found sufficient in *Lane* and *Hibbs*.[3] But respondents are incorrect as a matter of both precedent and principle.

Lane itself relied on evidence developed after the ADA's 1990 enactment, including a 2002 study discussing "the shortcomings of state discrimination statutes," *Lane*, 541 U.S. at 526 n.15, and court-access cases decided in 1993 and 1998, *see id.* at 525 n.14.

Lane was correct in refusing to impose respondents' proposed limits on the inquiry into evidence of constitutional violations. In arguing that Title II's constitutionality

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[3] The judicial decisions cited at pages 27-36 of our opening brief, include fully 14 final adjudications of constitutional violation that were rendered prior to the ADA's enactment (12 more than this Court cited in *Lane*).

must be based on the pre-ADA record of constitutional violations, respondents present a caricature of *Boerne*, reading that case as if it imposed some type of "on-the-record" review that treats Congress as if it were an administrative agency or a lower court. But this Court has made clear since *Boerne* that the "congruence and proportionality" test is not an effort to ensure that Congress is diligent in papering the file. Generally, "it is for Congress to determine the method by which it will reach a decision," *City of Boerne*, 521 U.S. at 532, and Congress need not "make particularized findings in order to legislate." *Gonzales v. Raich*, 125 S. Ct. 2195, 2208 (2005).[4] Moreover, it has

[4] Respondents' demand (at 27) that Congress "mention state prisons specifically in the findings undergirding Title II" is inapposite. Congress specifically identified "institutionalization" as one "critical area[ ]" in which "discrimination * * * persists." 42 U.S.C. § 12101(a)(3). This Court in *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998), noted that that finding of past and enduring unconstitutional treatment of institutionalized individuals with disabilities can naturally "be thought to include penal institutions." In any event, respondents' argument flies in the face of *Lane*. No congressional finding specifically mentions courthouse access, but the Court nonetheless sustained Title II as applied to that context in *Lane*. There is simply no requirement "that legislation must contain detailed findings proving that each activity regulated within a comprehensive statute is essential to the statutory scheme." *Cf. Raich*, 125 S. Ct. at 2208 n.32; *see also Amicus* Statement of Former President George H.W. Bush 4 ("To be effective in addressing the pervasive discrimination by public agencies, among others, the ADA needed to be cohesive, coordinated, and comprehensive."). Indeed, there is no constitutional basis for requiring Congress to hold hearings, make findings, or publish debates at all. The determination of the means by which Congress will inform itself regarding pending legislation is a core legislative function. *See Buckley v. Valeo*, 424 U.S. 1, 137-138 (1976) (per curiam); *see also Amicus* Br. of Lawyers' Comm. For Civil Rights Under Law 26. And both congressional hearings and published debates were rare throughout the Nation's early history. *See Watkins v. United States*, 354 U.S. 178, 193 (1957) (noting rarity of legislative hearings in 1800's); David P. Currie, *The Constitution in Congress: The First Congress and the Structure of Government, 1789-1791*, 2 U. Chi. L. Sch. Roundtable 161, 166 (1995) (noting that in the early congresses, consistent with practice during the Articles of Confederation, Senate deliberations were not

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been a bedrock principle of this Court's jurisprudence since *United States v. Darby*, 312 U.S. 100, 114-115 (1941), that the relevant question in a congressional power case is whether Congress has regulated conduct it has the power to regulate – not whether Congress acted with an appropriate state of mind.

Boerne looks not to Congress's decisionmaking process or findings, or to what Congress could have "known," but to the statute Congress enacted. *See City of Boerne*, 521 U.S. at 531 (stating that judicial deference "is based not on the state of the legislative record Congress compiles but 'on due regard for the decision of the body constitutionally appointed to decide'") (quoting *Oregon v. Mitchell*, 400 U.S. at 207 (opinion of Harlan, J.)). The *Boerne* inquiry asks whether a statute, as applied to the case before the Court, *see Lane*, 541 U.S. at 530-531, is one that "remed[ies] or prevent[s] unconstitutional actions" or is, instead, one that exceeds Congress's authority by "mak[ing] a substantive change in the governing law." *City of Boerne*, 521 U.S. at 519. To answer that question, what are crucial are the facts in the world, not the facts before Congress – as this Court has recognized. *See Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 646 (1999) (stating that a court reviewing a statute under *Boerne* must "identify[] the targeted constitutional wrong or evil" but noting that "the lack of support in the *legislative record* is not determinative") (emphasis added).

Indeed, even when examining legislation under heightened scrutiny to vindicate individual rights protected by the Bill of Rights – scrutiny far more rigorous than that applied under the congruence and proportionality test – the Court has looked to facts outside the legislative "record" in making its determination. *See Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 212-213 (1997)

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open to the public and the House did not provide verbatim transcripts of debates).

(relying on post-enactment evidence); *cf. City of Erie v. Pap's A.M.*, 529 U.S. 277, 297-298 (2000) (upholding local ordinance against First Amendment challenge because city council "may take official notice of such 'legislative facts' within its special knowledge, and is not confined to the evidence in the record in reaching its expert judgment"); *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 393, 395 (2000) (holding that State had sustained its burden to justify regulation of speech by pointing to an affidavit by a state legislator, two newspaper articles, and four incidents discussed in another judicial opinion).

Limiting the Section 5 inquiry to the facts at the time a statute was enacted would have absurd consequences. If such a limitation applied, this Court's decision to uphold or strike down a statute would turn on the mere fortuity of when it was enacted. If prophylactic legislation were enacted two years before complete documentary evidence of constitutional violations was compiled, for example, this Court would be compelled to strike down that statute even if it would have upheld the very same legislation if it had been enacted two years later. Such an approach would, in effect, punish Congress for prescience.

In short, there is no basis for respondents' assertion that this Court must ignore the widespread evidence of constitutional violations that postdate the ADA's enactment. That evidence could hardly undermine the validity of Title II of the ADA; to the contrary, it underscores the continuing need for prophylactic and remedial legislation in this area. As we demonstrated in our opening brief (at 34-36 nn.24-26), Title II has proved an important means by which inmates with disabilities can challenge violations of their constitutional rights.[5]

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[5] Respondents' *amici* also contend (Tenn. Br. 15 & n.3) that because *some* local jails have been held not to be Eleventh Amendment "arms of the State," this Court should not consider constitutional violations perpetrated in *any* local jail. But of the 73 judicial decisions cited in our opening brief, fully 52 (including 22 final adjudications of constitutional

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4. There is No Basis for Disregarding the Documentation of Constitutional Violations in the 1980 CRIPA Legislative Record and the 1983 Civil Rights Commission Report, Both of Which Predate the ADA's Enactment

Respondents also suggest (at 25-26) that this Court should not consider any evidence developed before the two-year period during which the ADA was pending in Congress. In particular, they urge that this Court should not consider the substantial record of violations of disabled inmates' constitutional rights developed in the hearings that preceded enactment of the Civil Rights of Institutionalized Persons Act of 1980 (CRIPA). *See* Goodman Br. 23-24. They also urge that this Court should not consider the 1983 Civil Rights Commission report that specifically listed "[in]accessible jail cells and toilet facilities" and "[a]buse of handicapped persons by other inmates" as discrimination problems faced by individuals with disabilities. U.S. Comm'n on Civil Rights, *Accommodating the Spectrum of Individual Abilities* 168 (1983).

There is no basis for limiting this Court's examination of legislative materials to those during the two years that immediately preceded the enactment of the ADA. The evidence about unconstitutional treatment of inmates with disabilities developed in the CRIPA hearings and the Civil Rights Commission report necessarily informed Congress's subsequent enactment of Title II. "After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area." *Fullilove v. Klutznick*, 448

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violations) involved state prisons or local jails in States where local jails have been held to be "arms of the State." Only five of the judicial decisions cited in our opening brief – and only one of the final adjudications of constitutional violation (*Mitchell v. Untreiner*, 421 F. Supp. 886 (N.D. Fla. 1976)) – involved a local jail that has been held not to be an "arm of the State."

U.S. 448, 503 (1980) (Powell, J., concurring). And this Court in *Lane* relied on the same 1983 Civil Rights Commission report that respondents now urge this Court to disregard. *See* 541 U.S. at 527.

Those sources of information might be less probative if the evidence showed that constitutional violations had abated since the enactment of CRIPA or the publication of the Commission's report. *Cf.* Resp. Br. 24-25 (inferring that Congress thought CRIPA sufficient to solve the problem). But the evidence discussed in our opening brief (at 21-36) demonstrates that constitutional violations continued in prisons following the enactment of CRIPA. The persistent nature of the problem makes the continuing need for national prophylactic legislation especially urgent. *See Hibbs*, 538 U.S. at 730 ("the persistence of such unconstitutional discrimination by the States [after enactment of earlier federal legislation] justifies Congress' passage of prophylactic § 5 legislation").

5. The Judicial Decisions That Confirm the Record of Unconstitutional State Conduct Specifically Involve Violations of the Rights of Inmates with Disabilities

Finally, respondents assert that many of the judicial decisions that have found violations of the rights of inmates with disabilities actually involve "prison conditions applicable to all inmates" or "facility-wide deficiencies in medical or psychiatric care," and that those decisions are therefore irrelevant to Title II's constitutionality. Resp. Br. 32-34 (capitalization altered). Respondents are incorrect.

The decisions cited in our opening brief and listed in respondents' appendix at Tables I, III, and IV are cases in which the court found that a State had violated the constitutional rights of disabled inmates specifically by, for example, failing to accommodate their disabilities with appropriate medical or psychiatric care. In these cases, the courts found that state prisons had violated nondisabled inmates' rights as well. In some, the courts found nearly

every aspect of the prison to be constitutionally inadequate. But that does nothing to diminish the fact that in these cases state prisons *also* failed to comply with the obligations that the Constitution imposes on them in dealing with inmates with disabilities. Inmates with disabilities thus suffered twice: once by experiencing the same deficiencies that violated the constitutional rights of *all* inmates, then again by experiencing state conduct that violated the Constitution by failing to accommodate their disabilities.

The two cases that respondents discuss in their brief (at 33) clearly illustrate the point. In *Balla v. Idaho State Board of Corrections*, 595 F. Supp. 1558 (D. Idaho 1984), the plaintiffs broadly "alleged deficiencies in, *inter alia*, the prisoners' nutrition, clothing, and medical care." Resp. Br. 33. The district court concluded that the defendant prison's medical care system as a whole "persistently and predictably fail[ed] to provide adequately for the legitimate medical needs of the prison population" and thus violated the Eighth Amendment. *Balla*, 595 F. Supp. at 1568. But the court found specifically that the prison also had violated the Constitution by providing "[l]ittle or no psychiatric care or assistance" to "inmates who had attempted suicide who obviously were manifesting severe mental and emotional problems" – inmates who would almost certainly have a "disability" within the meaning of the ADA. *Id.* at 1569.

In *Battle v. Anderson*, 376 F. Supp. 402 (E.D. Okl. 1974), the court found an array of constitutional violations, including racial segregation, denial of procedural due process, improper use of chemical mace and tear gas on inmates, inadequate medical care, and other unconstitutional conditions of confinement. Both disabled and non-disabled inmates would be harmed by those violations, but the court also specifically found that the prison had "no professional psychiatric staff" on its rolls to treat inmates "hospitalized for psychiatric reasons" – again, inmates particularly likely to have a "disability" under the ADA.

Id. at 415. The fact that the States in these cases *also* violated the rights of nondisabled inmates does not detract from the courts' specific findings that they violated the rights of inmates with disabilities.

The other cases in these categories on which we rely are to similar effect. For example, as respondents note, *Ruiz v. Estelle*, 503 F. Supp. 1265 (S.D. Tex. 1980), involved extensive findings of systemwide constitutional violations in the Texas Department of Corrections. *See* Resp. Br. App. 5a; *Ruiz*, 503 F. Supp. at 1390. But the fact that constitutional violations were widespread in the Texas prisons does not undermine the *Ruiz* court's specific findings that the State violated its constitutional obligations to provide "accommodations for handicapped inmates which would enable them more effectively to function and contend with their desperately onerous situations in prison." *Id.* at 1340. The court found that the prisons (including their toilet and shower facilities) were inaccessible to inmates with physical disabilities, thus leaving those inmates to "either manage as best they can, with virtually no special assistance, in physical environments which pose extreme difficulties for them, or spend their days vegetating, denied access to virtually all the programs and activities available to non-disabled inmates." *Ibid.*; *see id.* at 1340-1343. The court also found that inmates with mental retardation were denied accommodations that were essential for them to participate meaningfully in disciplinary hearings, and that prison officials did not protect them from abuse at the hands of guards and other inmates – abuse to which their disabilities made them especially vulnerable. *Id.* at 1344-1345.[6]

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[6] *See also Tillery v. Owens*, 719 F. Supp. 1256, 1259, 1301-1304 (W.D. Pa. 1989) (finding "that nearly every aspect of [the state prison] which we consider here is inadequate, falling far below constitutional standards," but specifically noting the prison's failure to provide adequate psychiatric care to accommodate inmates with "serious mental illness"), *aff'd*, 907 F.2d 418 (3d Cir. 1990), *cert. denied*, 502 U.S. 927 (1991); *Newman v. Alabama*, 349 F. Supp. at 281, 284 (finding generally that Alabama prisons "have fallen far short of supplying the

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These cases thus do not show that the ADA imposes on States obligations that go beyond the constitutional violations they have committed. To the contrary, they show that States have committed constitutional violations that could justify prophylactic obligations that go beyond the disability context addressed by the ADA. But "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind," *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955), and Congress "need not deal with all phases of a problem in the same way," *South Carolina v. Katzenbach*, 383 U.S. at 331. The fact that Congress might have had authority to enact broader legislation protecting the constitutional rights of all inmates can hardly suggest that Congress lacked authority to adopt narrower legislation protecting the rights of inmates with disabilities.

C. Title II Is Reasonable Prophylactic Legislation Because It Is Calibrated To The Prison Context And Provides Appropriate, Limited Remedies

In light of the extensive record of state violations of the constitutional rights of inmates with disabilities, Title II of the ADA is "a reasonable prophylactic measure," *Lane*, 541 U.S. at 533, as applied to prison cases generally. *See* Goodman Br. 37-45.[7] Even if the statute were not valid

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constitutionally required level of adequate medical treatment" and further stating that "[t]he fate of those many prisoners who are mentally ill or retarded deserves special mention" because the State had completely failed to provide any of the psychiatric treatment necessary to accommodate their conditions).

[7] Respondents' *amici* assert (Tenn. Br. 23) that "Title II places the burden of proof on the State." That is incorrect. Title II plaintiffs bear the burden of proving that they have a disability, as that term is defined in the ADA, that they have been denied accommodations, and that those accommodations would have constituted "reasonable modifications" of the defendants' policies and practices. *Cf. US Airways, Inc. v. Barnett*, 535 U.S. 391, 399-402 (2002) (noting similar allocation of the burden of proof under Title I of the ADA). It is only after the

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Section 5 legislation as applied to some prison cases (such as one where the only issue is the denial of an inmate's access to television, *cf.* Resp. Br. 17 n.5), it is plainly reasonable prophylactic legislation, however, insofar as it applies to alleged denials of basic sanitary, mobility, medical, or safety needs or other independently protected constitutional interests. *See* Goodman Br. 44-45 n.27. Respondents' efforts to refute those points are meritless.

1. Respondents and their *amici* first contend that Title II is not valid in the prison context because Congress did not adopt any provisions that are "directed specifically" to prisons, but instead sought to guarantee nondiscrimination and accommodation to people with disabilities generally – even in contexts where disability-based discrimination is subject only to the rational basis test. Resp. Br. 39-41; Tenn. Br. 22. That argument flies in the face of *Lane*. No provision of Title II is directed specifically to courthouse access and the Court nonetheless refused "to consider Title II, with its wide variety of applications, as an undifferentiated whole." *Lane*, 541 U.S. at 530.

Where Congress plainly has the power to reach a case before the Court and adopts a statute that plainly reaches that case, basic principles of judicial restraint prevent this Court from invalidating the statute because Congress also sought to reach other cases in which its power would be less certain. *Lane* therefore held that "[w]hatever might be said about Title II's other applications," the question presented in that case was "not whether Congress can validly subject the States to private suits for money damages for failing to provide reasonable access to hockey rinks, or even to voting booths, but whether Congress had the power under § 5 to enforce the constitutional right of access to the courts." *Id.* at 530-531. So too here, the

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plaintiff has carried that burden that the defendant is required to bear the burden of proving the affirmative defense of fundamental alteration or undue hardship. *See* 28 C.F.R. § 35.130(b)(7); *Olmstead*, 527 U.S. at 606 (plurality opinion) (recognizing fundamental alteration as a "defense" under Title II).

question is not whether Title II is valid Section 5 legislation in all of the applications of its "generally applicable provisions," *cf.* Resp. Br. 41, but whether it is valid Section 5 legislation as applied to state prisons. *See Lane*, 541 U.S. 530-531.

There is no doubt that Title II, by its plain terms, reaches state prisons. *See Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 213 (1998). Respondents nonetheless argue (at 22-23) that one of Congress's stated purposes in preventing discrimination – to integrate people with disabilities into the mainstream of social and economic life – is inapplicable to prisons. Even if that argument were relevant, it would ignore the basic fact that most inmates "are eventually released" and they "have the same interest in access to the programs, services, and activities available to the other inmates of their prison as disabled people on the outside have to the counterpart programs, services, and activities available to free people. They have no right to more services than the able-bodied inmates, but they have a right, if the Act is given its natural meaning, not to be treated even worse than those more fortunate inmates." *Crawford v. Indiana Dept. of Corr.*, 115 F.3d 481, 486 (7th Cir. 1997) (Posner, J.).[8]

The ADA's requirement of "reasonable" modifications necessarily takes account of context – including, in the prison setting, "[s]ecurity concerns, safety concerns, and administrative exigencies." *Love v. Westville Corr. Center*, 103 F.3d 558, 561 (7th Cir. 1996). Respondents suggest that Title II's reasonableness language is insensitive to this context. Resp. Br. 40. But that suggestion is puzzling

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[8] Respondents suggest (at 20, 22-24, 28-29) that Title II's general language leaves some doubt about whether Congress intended to abrogate state sovereign immunity in prison cases. (In making that suggestion, respondents incidentally violate their own rule by pointing to a congressional speech made five years *after* the ADA's enactment. Resp. Br. 28.) But the ADA unambiguously abrogates Eleventh Amendment immunity from suit, without excluding any class of cases from that abrogation. 42 U.S.C. § 12202.

in light of this Court's precedent, which has read the far more stringent "compelling governmental interest" language in the Religious Land Use and Institutionalized Persons Act to account for the unique imperatives of the prison context. *Cutter v. Wilkinson*, 125 S. Ct. 2113, 2123 (2005); *see* Goodman Br. 40-41. By using the language of reasonableness in Title II, Congress gave the courts both the power and the duty to "carefully calibrate[]," Resp. Br. 40, the statute's application to the prison context. To read the statute, as respondents urge, to invite a constitutional question would be inconsistent with the exercise of "the gravest and most delicate duty that this Court is called on to perform" – the duty to determine whether an Act of Congress violates the Constitution. *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.).

2. Respondents also contend (at 44) that Title II is disproportionate because it does not require plaintiffs to show deliberate indifference. But of course it is in the nature of prophylactic legislation to "prohibit 'a somewhat broader swath of conduct, including that which is not itself forbidden by the [Fourteenth] Amendment's text.'" *Lane*, 541 U.S. 533 n.24 (quoting *Kimel v. Florida Board of Regents*, 528 U.S. 62, 81 (2000)). Given the extensive record of state violations of the constitutional rights of inmates with disabilities, dispensing with the deliberate indifference requirement is a congruent and proportional response here. *See id.* at 520.

Moreover, the differences between the ADA's accommodation requirement and the Eighth Amendment's deliberate indifference test should not be overstated. Where individualized accommodations are concerned, Title II's requirement of "reasonable modifications," 42 U.S.C. § 12131(2); 28 C.F.R. § 35.130(b)(7), is not triggered until an individual with a disability requests an accommodation. That request will put the State on notice of the disability and the need for accommodation. If the State denies the accommodation in the face of that request, the denial would likely meet the deliberate indifference

element of the Eighth Amendment. *See Farmer*, 511 U.S. at 846-847 & n.9. And of course any request for damages under Title II will be subject to the very similar "deliberate indifference" standard that applies to damages actions under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, pursuant to *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290-291 (1998); *see Barnes v. Gorman*, 536 U.S. 181, 184-185 (2002) (ADA Title II incorporates the remedies of Title VI and Title IX, including the limitations on those remedies). Any differences between the constitutional deliberate indifference test and the statute's requirement of reasonable modification are therefore minimal in this context.

3. Finally, respondents and their *amici* contend that, whatever the validity under Section 5 of Title II's *substantive* requirements, a damages remedy is unnecessary and disproportionate to constitutional violations given the availability of the Section 1983 cause of action against officials in their individual capacities. Resp. Br. 29; Tenn. Br. 24-26. That argument rests on a misreading of *Boerne*. The "congruence and proportionality" test is a means of determining whether Congress has exceeded its remedial power by seeking "to decree the substance of the Fourteenth Amendment's restrictions on the States." *City of Boerne*, 521 U.S. at 519-520. It does not limit Congress's unquestioned power to determine the remedies for violation of an otherwise constitutional statute. Where the substantive obligations that Congress has imposed on the States satisfy the congruence and proportionality test, nothing in Section 5 demands an additional showing to justify a damages remedy to enforce those obligations. Nor does anything in the Eleventh Amendment demand such a showing. This Court's decision in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), makes clear that, so long as Congress has Section 5 power to impose a given substantive rule on the States, the Eleventh Amendment does not limit the power of Congress to impose any remedy, damages or otherwise, for a violation of that rule. *See id.* at 456 (Eleventh

Amendment no obstacle "[w]hen Congress acts pursuant to § 5").

These points hold particularly true where the remedy authorized by Congress consists merely of compensatory damages, as it does here. *See Barnes*, 536 U.S. at 188 (punitive damages not available under Title II of the ADA). Compensatory damages create the proper incentives for entities to comply with the law without the need for litigation. *Cf. McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 358 (1995) ("Congress designed the remedial measures in these statutes to serve as a 'spur or catalyst' to cause employers 'to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges' of discrimination. Deterrence is one object of these statutes.") (citations omitted). Absent the availability of at least compensatory damages, an entity loses nothing when it drags its feet until suit is brought – and it gains the benefit of the fact that such a suit may never be brought.[9] Damages are also "a traditional form of compensation for invasion of a legally protected interest." *Bivens v. Six Unknown Named Agents of Fed. Bur. of Narcotics*, 403 U.S. 388, 408 (1971) (Harlan, J., concurring). Having properly adopted a substantive rule of law to enforce the Fourteenth Amendment – based on an extensive record of violations of the constitutional rights of inmates with disabilities – Congress was surely entitled to authorize the most basic of damages remedies for violating that rule.

And despite respondents' claim to the contrary (Resp. Br. 10 n.2), this case is not solely about the availability of damages. Although the Eleventh Circuit permitted the ADA claims to continue against the state officials in their official capacities for injunctive relief, the court did not

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[9] Where only injunctive relief is available, a State may not even be liable for attorneys' fees if it waits to comply with the law until suit is brought, so long as the State's eventual compliance moots any continuing equitable claim. *See Buckhannon Bd. & Care Home v. West Virginia Dep't of Health & Human Res.*, 532 U.S. 598 (2001).

address (and in the companion case of *Miller v. King*, 384 F.3d 1248, 1268 n.23 (2004), expressly reserved), respondents' argument made in the district court that the ADA was not a valid exercise of Congress's Commerce Clause authority. Goodman Br. 45 (quoting Dt. Ct. Dkt. 31 at 7). If that argument were to be sustained, and this Court were to rule here that the ADA is not proper Section 5 legislation in this context either, the statute could not support any relief – damages or an injunction – against any of the respondents.

Although respondents' current concession (Resp. Br. 10 n.2) regarding petitioner Goodman's "right to pursue" (and presumably obtain) injunctive relief is welcome, respondents' *amici* make no such concession. There is every reason to believe that if this Court holds that Title II exceeds Congress's Section 5 power in the prison context, States throughout the nation will immediately challenge the Commerce Clause basis for the statute in that context as well. Indeed, thirty-three States (including Georgia and Tennessee) have previously argued to this Court that "Congress lacks authority under the Commerce Clause to apply the ADA in the context of state prisons." Brief of *Amici Curiae* Nevada *et al.*, at 7, in *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206 (1998) (capitalization altered); *see also* Brief of *Amici Curiae* Virginia *et al.*, at 17, in *Cutter v. Wilkinson*, 125 S. Ct. 2113 (2005) (brief of 8 States urging that Religious Land Use and Institutionalized Persons Act was not valid Commerce Clause legislation because "a State's operation of its prisons has little or no impact on interstate commerce"). If that argument were to prevail, Section 5 would provide the only basis for applying the ADA at all in the prison context, regardless of the relief a plaintiff seeks.[10]

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[10] Nor do respondents suggest that any state law claim exists for petitioner Goodman to obtain either injunctive relief or damages. *See also Amicus* Brief of National Disability Rights Network 29 (citing a 1984 Georgia Attorney General opinion that concludes that state law

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Respondents' *amici* contend that a damages remedy is improper in the prison context because of the problem of "vexatious prison litigation." Tenn. Br. 25 n.7. But that is an argument properly directed to Congress, *see Crawford-El v. Britton*, 523 U.S. 574, 601 (1998) (Kennedy, J., concurring), and indeed, it is one that Congress has addressed. As pointed out in our opening brief (at 42-43), the Prison Litigation Reform Act (PLRA) imposes significant limitations on the ability of inmates to bring Title II money damages suits. Although *amici* suggest (at 25) that the PLRA has not fully eliminated the burden of inmate litigation – a suggestion that, again, would be properly addressed to Congress – the facts do not support *amici's* argument. Since the PLRA took effect, there has been a "dramatic" decrease in the filing of federal-court complaints by inmates, with a drop of thirty-three percent in the first year of the statute's implementation alone. Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1634 (2003); *see id.* at 1584, fig. I.A. Thus, even if it were this Court's province to add to the limitations that Congress has already imposed on inmate litigation, there would be no need to do so. *See Crawford-El*, 523 U.S. at 596-597.

II. TITLE II IS APPROPRIATE REMEDIAL LEGISLATION AS APPLIED TO THE RECORD OF THIS CASE

Finally, respondents contend, as did the court of appeals, that Title II cannot be valid Section 5 legislation as applied to this case or *any* prison case unless it is valid Section 5 legislation as to *all* prison cases. Resp. Br. 42-44. But although *Lane* upheld Title II as applied to an entire

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requiring government buildings be physically accessible to people with disabilities does not apply to jail cells); *see also id.* at 28-29 (citing other state statutes and cases that exclude inmates from protections of state disability antidiscrimination laws).

"class of cases" in the context of access to the courts, 541 U.S. at 531, the Court at the same time reaffirmed the principle that "'if the *complaint* here called for an application of the statute clearly constitutional under [Congress's enforcement power], that should have been an end to the question of constitutionality,'" *id.* at 531 n.19 (quoting *United States v. Raines*, 362 U.S. 17, 24-25 (1960)) (emphasis added). Thus, even if the ADA were not valid *prophylactic* Section 5 legislation at all in the prison context, it is valid *remedial* Section 5 legislation on this record where the State's alleged violation of Title II also would violate the plaintiff's constitutional rights. *See* Goodman Br. 45-50.[11]

Respondents assert that the *Raines* principle does not permit the congressional power analysis to be conducted on a case-by-case, as-applied basis. But *Raines*'s own language rejects that reading, as does the square holding

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[11] Respondents contend (at 41-42) that this argument is not "fairly included" within the question on which the Court granted *certiorari*, because that question speaks of "discrimination by state-operated prisons," and the Eighth Amendment claims here are not claims of "discrimination." Respondents again ignore that Title II treats the failure to accommodate disabilities as "discrimination." *See* pp. 6-7, *supra*. The State's alleged failure here to accommodate an inmate with a disability would constitute "discrimination" under Title II of the ADA, and it also would violate the Eighth Amendment. The petition for *certioriari* made clear (Goodman Pet. 11-14, 17-19) that the determination whether the ADA validly abrogates state sovereign immunity in a case where the defendant's alleged ADA violations also would violate the Constitution was included in the question presented, which asks "[w]hether, *and to what extent*," Title II validly abrogated state sovereign immunity in the prison context. Goodman Pet. *i* (emphasis added). Indeed, the petition emphasized that the opportunity to decide whether the ADA is constitutional as applied to alleged conduct that itself would violate the Constitution made this case a particularly good vehicle for *certiorari*. Goodman Pet. 20. Furthermore, the United States' petition for *certiorari* in No. 04-1203, in which Goodman is a respondent under this Court's Rule 12.6, does not use the term "discrimination," but asks whether the ADA was valid legislation "as applied to the administration of prison systems."

of *Griffin v. Breckenridge*, 403 U.S. 88, 106 (1971), which engaged in a fact-intensive, case-specific analysis to uphold the constitutionality of 42 U.S.C. § 1985(3) insofar as it applied to "the private conspiracy alleged by the complaint in [that] case." *Griffin*, 403 U.S. at 104.

Similarly, in *Katzenbach v. Morgan*, 384 U.S. 641 (1966), this Court engaged in the same as-applied approach in assessing the constitutionality of Section 4(e) of the Voting Rights Act of 1965, which provided that all persons who completed the sixth grade in an accredited public or private school in which the language of instruction was other than English could not be excluded from voting for failure to read or write English. *See id.* at 644 n.1. The Court limited the "scope of [its] inquiry" to the provision's validity as applied to persons who had completed the sixth grade in schools in Puerto Rico and were barred from voting by New York State's literacy requirement. *Id.* at 645 n.3. The Court held that "*in the application challenged in these cases*, § 4(e) is a proper exercise of the powers granted to Congress by § 5 of the Fourteenth Amendment." *Id.* at 646 (emphasis added).

As the court of appeals itself recognized, many of the allegations in this record would establish a violation not just of Title II of the ADA but also of the Constitution itself. As applied to those allegations, Title II clearly provides a remedy for actual constitutional violations, and this Court's conclusion in *Griffin* is equally apt here: "[S]ince the allegations of the complaint bring the cause of action so close to the constitutionally authorized core of the statute, there has been no occasion here to trace out its constitutionally permissible periphery." 403 U.S. at 107.

CONCLUSION

For the reasons set forth above and in our opening brief and the briefs of the United States, the judgment of

the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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